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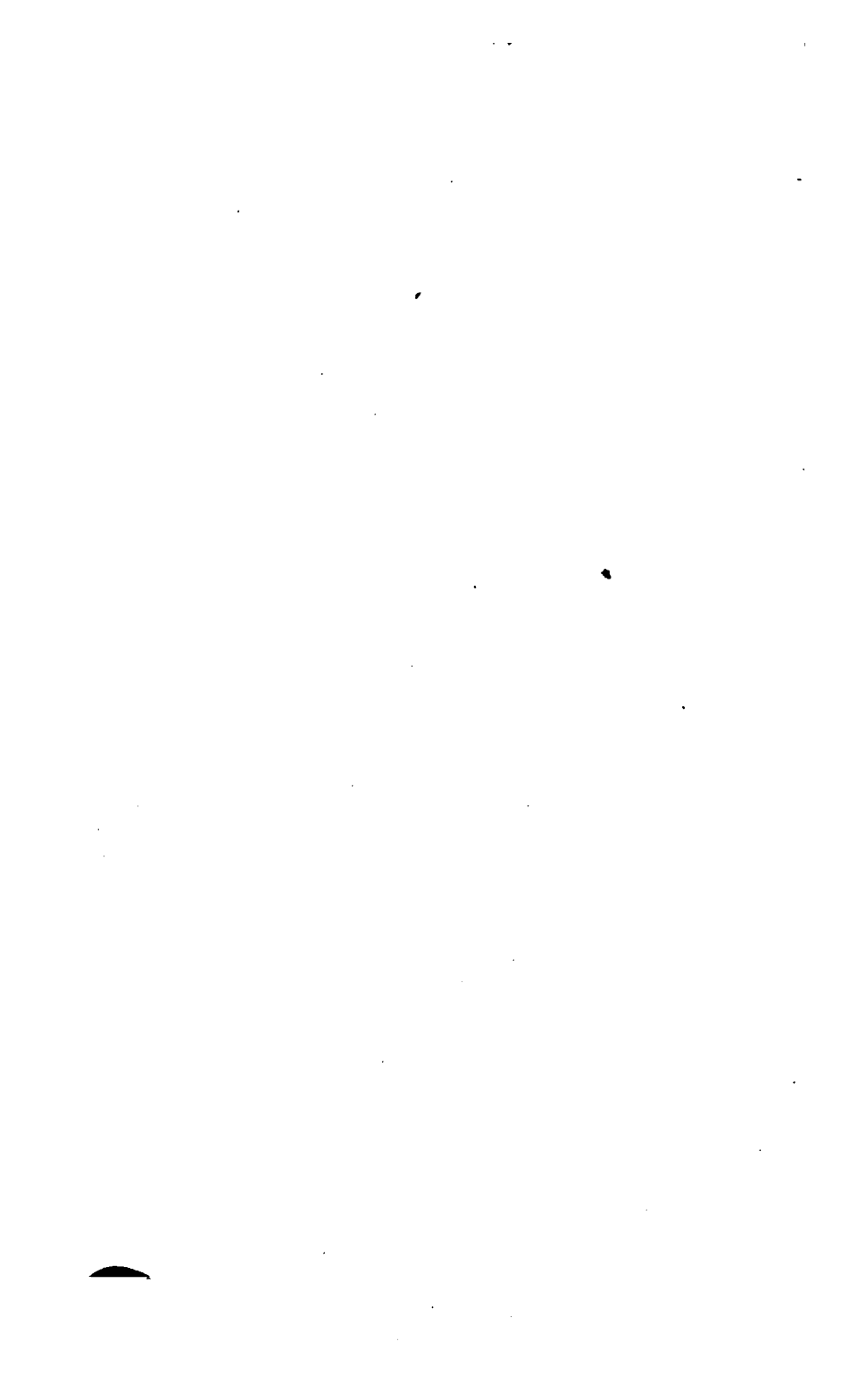
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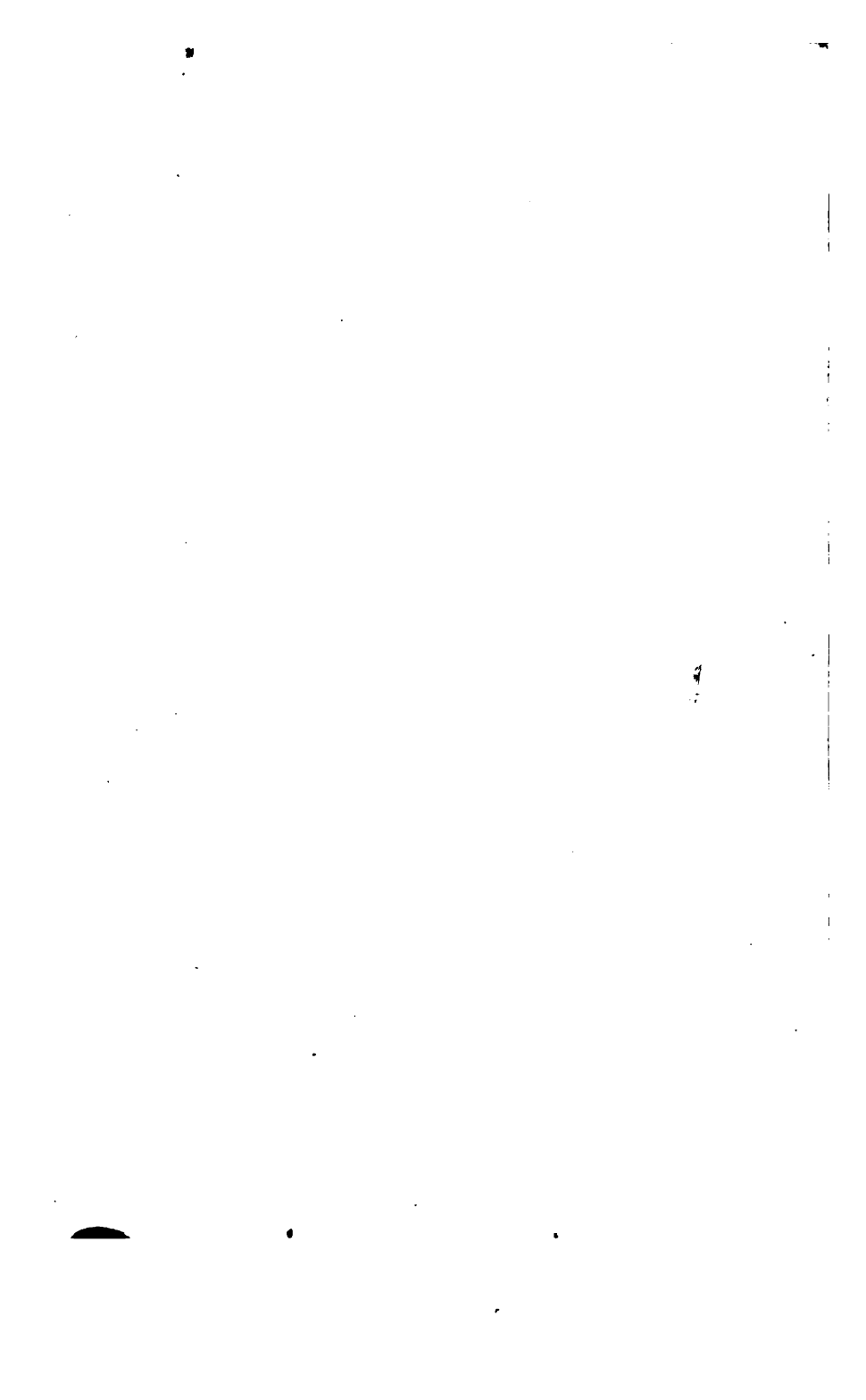
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SEABORNE'S

Vendors & Purchasers of Real Property.



A
CONCISE MANUAL
OF THE LAW RELATING TO
VENDORS & PURCHASERS
OF
Real Property.

BY
HENRY SEABORNE,
SOLICITOR.

THIRD EDITION.

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TO THE THIRD EDITION.



IN this Edition the alterations which have taken place in the law since the first issue of the work in 1871 have been incorporated in the text. During this interval several important statutes have been passed and decisions arrived at affecting the law of real property, which will be found treated in their proper places.

H. S.

MARCH, 1884.

PREFACE

TO THE FIRST EDITION.

NOTWITHSTANDING the works on the Law relating to Vendors and Purchasers by Lord St. Leonards and Mr. Dart, the writer has reason to assume a less comprehensive work upon the subject would probably be entertained by the profession—a work which would follow these learned treatises in a somewhat similar manner to that in which Mr. Smith's admirable manuals of Equity and Common Law follow the more elaborate works upon which they are founded. In this belief the present compilation is submitted, not that the writer can venture to hope that it will occupy a similar place in the estimation of the practitioner or student to the manuals referred to; but he trusts that it may furnish a ready means of access to the statutory enactments and judicial decisions governing the various incidents and matters to which reference may become necessary upon the investigation of a title or a sale or purchase of real property; and, moreover, that it may serve to bring these authorities to the attention of students in a shape which will lead to a knowledge of the circumstances making the stipulations usually met with in contracts for sale of real property, and the forms of assurance adopted for its transfer, necessary or advisable.

H. S.

NOVEMBER, 1871.



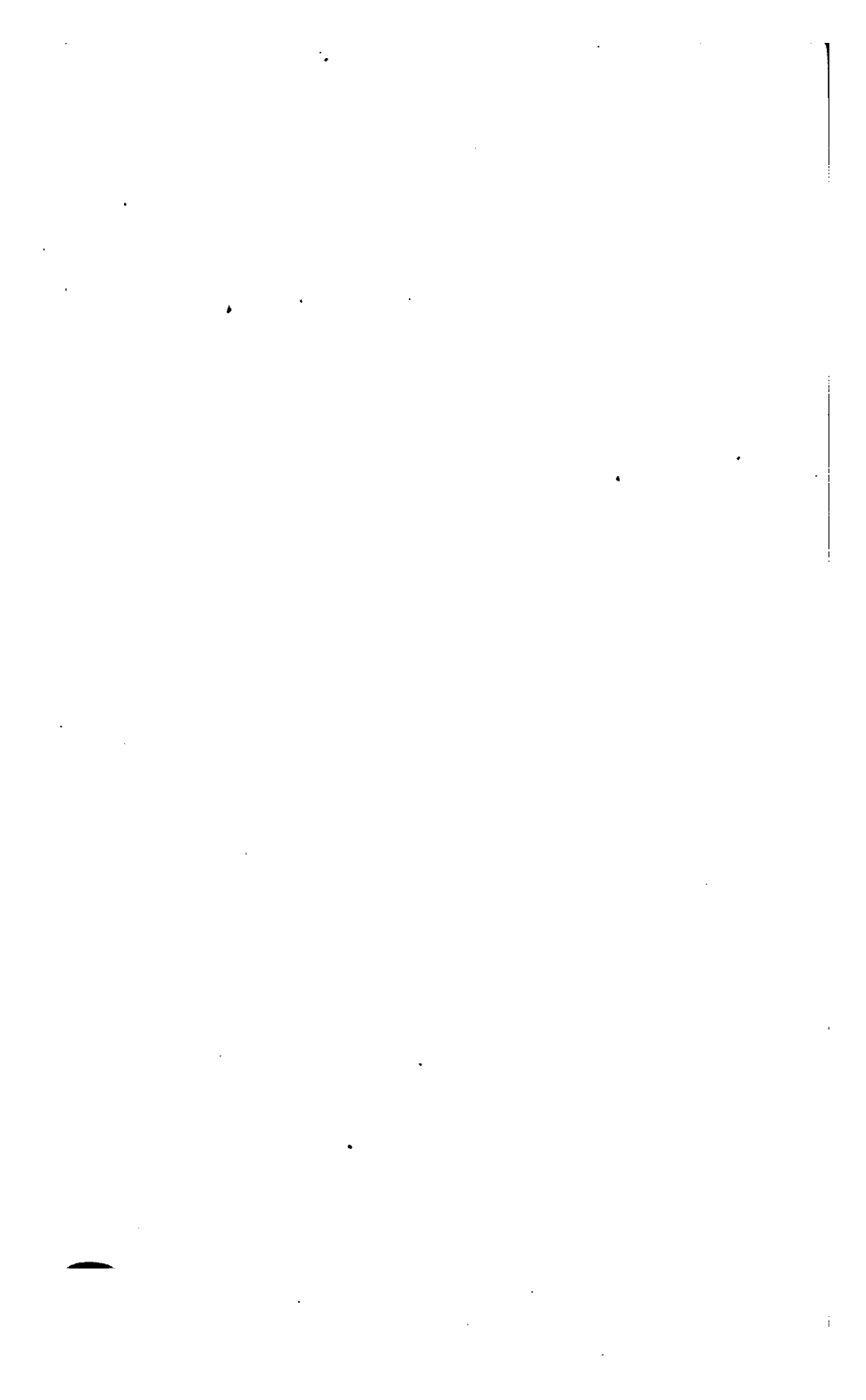


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THE LAW
RELATING TO
VENDORS AND PURCHASERS OF
REAL PROPERTY.

PART I.
OF TITLE AND THE INVESTIGATION THEREOF.

CHAPTER I.
ABSTRACT OF TITLE.


SECTION 1.

Preparation of Abstract.

THE primary consideration with reference to the sale or purchase of an estate should be the title of the proposed vendor, and before entering into a contract for sale the state of the title of the person about to sell should be ascertained by him, in order that he may protect himself by inserting in the contract such special stipulations as the nature of his title and the evidence thereof in his possession may render necessary to preclude a purchaser from calling for such a deduction of

title as a mere open contract would otherwise entitle him to insist upon, though the Conveyancing and Law of Property Act, 1881 (*a*), has to some extent restricted the rights of purchasers, and rendered many provisions formerly inserted in contracts for the protection of vendors unnecessary. With a view to this protection, the title of the proposed vendor, and the evidence thereof, should be perused and considered and an abstract prepared, even though it may not be intended to take the opinion of counsel thereon. The preparation of the abstract is frequently delayed until the estate is actually sold, the solicitor of the proposed vendor contenting himself merely by a persual of the muniments and a short epitome of them; but where practicable it is desirable that the abstract should be prepared in the first instance, and we will endeavour to show what title a purchaser is entitled to be furnished with, the various incidents of title which require consideration, and the manner in which the title should be evidenced, premising that at the present day the purchaser's rights in this respect are considerably abridged by restrictive stipulations, which are almost invariably inserted in the contract when the vendor avails himself of professional assistance in the preparation thereof.

(*a*) 44 & 45 Vict. c. 41.



SECTION 2.

Form of Abstract.

The abstract of title is usually written on brief paper with three inner margins. The outer margin should be left clear for the person investigating the title to insert any note or intended inquiry which may suggest itself as the perusal of the abstract advances; though it is sometimes necessary for the person preparing it to resort to the outer margin in order to insert a note or statement necessary for properly placing the title upon the abstract.

The abstract should commence with a heading written from the third margin, stating the name of the person, whose title is proposed to be deduced, the tenure and situation of the property; and should the interest of such person consist of an undivided share or shares only in the estate, this circumstance should appear.

It frequently happens that an estate which has been held as one property by successive owners, was originally purchased in several distinct portions at different periods under various titles, which, upon a sale of the entire estate, require to be disclosed. In such a case it will be found very convenient to prepare a distinct abstract in respect of each portion of the property so purchased, continuing such abstract down to the time such portion became dealt with as a part of the general estate, and confining the title to the general estate to one abstract.

Occasionally the title is rendered more complicated by the owner of the estate, or his predecessors in title, after having acquired portions of it, dealing with such portions in a manner differing from those subsequently acquired. In such a case it will be found convenient, where the length of title to each part will permit, to prepare one abstract embracing the titles thus separately dealt with, keeping each separate title distinct, and then follow it up with the general dealings with this particular portion of the estate down to the time when such estate was dealt with as a whole.

Where the titles to several properties are put upon one abstract, care should be taken to keep such titles distinct; and it should be shown by proper headings throughout the abstract to what estate, or what particular portion thereof, the title is from time to time being deduced, thus:—"As to the estate known as —," or "As to the hereditaments situate at —." Where the estate has become vested in tenants in common, or other part owners, their titles should be kept distinct, and should be denoted by headings, thus:—"As to the one-fourth share of G. H.," or as the case may be. And when the entire property has become subject to a general title, the subsequent dealings therewith should be placed under a heading, stating that what follows relates to the entire estate.

The documents should be abstracted in order of date. All facts and circumstances material to the title, such as deaths without issue, intestacies, &c., being noticed as they occur in like order.

It is usual to give the descriptions and additions of the parties to the documents, and the character in which they are parties, such as heir-at law, personal representative, or otherwise, when they are so described—a very frequent addition in ancient deeds, though rarely met with in modern ones. It is usual for this portion of the abstract to be written from the outer margin.

Recitals are almost invariably written from the first inner margin, and should be given in the past tense, but in other respects verbatim, and should be confined to those affecting the title proposed to be deduced.

The abstract of the testatum is usually written from the outer margin. The consideration should be mentioned, and by and to whom paid. The acknowledgment of the receipt should also be stated. The leading operative words, such as “grant and convey,” in a conveyance; “release,” in an indenture of release; “exchange,” in a deed of exchange; and “assign,” in an assignment, should be mentioned, but it is usual to omit the accompanying operative words, as also those in the past tense, generally met with in old deeds. In conveyances by lease and release, when the lease is referred to in the release, reference should also be made to it in the abstract. In statutory deeds executed in pursuance of the Conveyancing and Law of Property Act, 1881, the character in which the parties execute should also be stated, whether as beneficial owner, mortgagee or the like.

The parcels are invariably set out from the third inner margin, and should be described verbatim from

the firstly abstracted document containing them, with all exceptions and reservations; a mere statement of the existence of the clauses as to all the estate and all deeds will suffice. The parcels in a subsequently abstracted document, when they are precisely similar to those in a document previously abstracted, should be described by reference to such previously abstracted document, as "The before-mentioned premises, by the description thereof contained in the abstracted indenture of the — day of —."

The habendum, which is frequently written from the second inner margin, with the words limiting the use, should be fully set out. Where the estate is limited to uses to bar dower by the abstracting deed, such uses should be set out, and not a mere statement made that the estate is limited to the usual uses to bar dower.

Trusts by way of limitation of the estate must be abstracted in the same manner as limitations of the use, and powers acted upon or intended to be exercised should also be fully abstracted; so also should all provisos for cesser of terms of years.

Powers, provisos and declarations are frequently written from the outer margin.

Covenants for title should be shortly stated, care being taken to mention any exception which may occur therein.

In the preparation of the abstract care should also be taken, as far as possible, to anticipate the scrutiny the deeds will undergo when they are produced for comparison with the abstract, as mentioned (Chap. IX.,

Sect. 2, *infra*), and with this view the names of the parties who have executed and signed receipts for consideration money should be mentioned, and any endorsements on such deeds referred to. It is not, however, usual in practice for the person preparing the abstract to mention thereon the stamp duties impressed upon the abstracted documents.

SECTION 3.

Contents of Abstract.

A contract for sale of real estate implies an agreement to make a good title to the property sold, and a vendor of freehold or copyhold property was, until recently, bound to deduce a title for a period of sixty years preceding the day of sale (*a*); but now the Vendor and Purchaser Act, 1874 (*b*), provides that, on the completion of any contract of sale of land made after the 31st December, 1874, subject to any stipulation to the contrary in the contract, forty years shall be substituted for sixty years, though an earlier title than forty years may be required in cases similar to those in which an earlier title than sixty years might, prior to the time named for the commencement of the act, have been called for (*c*). It is assumed that the word land in this section has the same meaning as given to it by sect. 1 of 3 & 4 Will. 4, c. 27, and extends to "manors, mes-

(*a*) *Cooper v. Emery*, 1 Phil.
388.

(*b*) 37 & 38 Vict. c. 78.

(*c*) *Ib.* sect. 1.

suages, and all other corporeal hereditaments whatsoever, and also to tithes (other than those belonging to a spiritual or eleemosynary corporation sole), and also to any share, estate or interest in them, or any of them, and whether freehold or copyhold, or held according to any other tenure." Prior to the passing of the Conveyancing and Law of Property Act, 1881 (*d*), in cases where the title commenced with a will or an instrument depending upon any other proceeding for its validity, the purchaser was entitled to have the title carried back to the creation of the estate purported to be dealt with by the document proposed as such root of title in the absence of stipulation to the contrary, but now such a right is negatived by sect. 3, sub-s. 3, of the act.

The best root of title is a mortgage or purchase deed, as such a document leads to the inference that at the time of the execution thereof the title must have been investigated, and in the case of a purchase deed the seisin of the predecessor in title is shown.

Prior to the Vendor and Purchaser Act, 1874, if the vendor's interest consisted of a term created within a period of sixty years preceding the date of the contract, the title of the lessor had to be carried back for such a period as, with the title to the term from its creation, would make up a period of sixty years, unless indeed the lease were granted by an ecclesiastical corporation (*e*); but now it is provided (*f*) that, under a con-

(*d*) 44 & 45 Vict. c. 41.

(*f*) 37 & 38 Vict. c. 78, s. 2,

(*e*) *Fane v. Spencer*, 2 Mer. 430; sub-s. 1.

and see Sugd. V. & P. 369.

tract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate (subject to any stipulation to the contrary in the contract), the intended lessee or assign shall not be entitled to call for the title to the freehold.

This enactment, though it prohibited an intended lessee or assignee from calling for the title to the freehold, did not impose a like prohibition in case the interest dealt with was derived under an underlease, and there was consequently a superior leasehold title, but in such a case the title of the sub-lessor could be required, and, if it were of sufficient duration, carried back for a period of forty years, but, as it is assumed, not earlier; but now the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 1, provides, that under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion. //

Having selected the root of title, every subsequent deed and document affecting the property should be abstracted (with the exception of any document which does not and has not affected the vendor's right to sell (g)); all circumstances affecting the title should be stated, and all incumbrances effected thereon shown, whether such incumbrances have been discharged or not (h).

The fraudulent concealment by the seller or his solicitor or agent of any settlement, incumbrance or other instru-

(g) Prid. Con. tit. "Abst."

(h) *Drummond v. Tracy*, Johns. 608.

If the lease be held for lives, evidence must be given of the existence and correct ages of the *cestuis que vie*, even though there should be a covenant for perpetual renewal (*r*).

Where a term which has been in existence for more than forty years is sold, the abstract should show the creation of the term and a forty years' title to the possession thereof, omitting the intermediate period, and a contract for purchase has been enforced notwithstanding the loss of the document creating the term (*s*); but in a recent case (*t*), where the contract did not contain a provision protecting the vendor against production of deeds not in his possession, he was held to be bound to produce the lease which was the root of title. Prior to the Vendor and Purchaser Act, 1874 (*u*)—a title for sixty years could have been required.

The same rule prevails in the case of satisfied terms which have become merged under the provisions of 8 & 9 Vict. c. 112; and the intermediate assignments from the commencement of the title to the inheritance should be taken down to the date of merger. It is almost needless to say that the abstract of such assignments need be but very short, and indeed it is frequently omitted in practice.

Upon the sale of property held under grant from the crown (such as tithes, for instance, held as a lay pro-

(*r*) *Anderson v. Hyman*, 1 J. & L. 718.

(*s*) 1 Jarm. Con. by S. 69.

(*t*) *Frend v. Buckley*, 5 L. R., Q. B., Ex. Ch. 213.

(*u*) 37 & 38 Vict. c. 78.

party), the title must commence with the original grant from the crown; and it has been held that the title following such grant may commence at the same period as the title to the estate out of which the tithes issue would have done. Thus having regard to the Vendor and Purchaser Act, 1874, s. 1, a forty years' title previous to the day of sale must be deduced instead of a sixty years' title as theretofore (*v*); and though the tithes may have been merged under the acts of 6 & 7 Will. 4, c. 71, and 1 Vict. c. 69, should the estate be sold as tithe free, the earlier title must be produced (*w*).

Upon a sale of copyholds the title as it appears upon the court rolls should be deduced, as also the equitable title.

Where the sale is of enfranchised copyholds, the copyhold title, as also the title of the lord of the manor ^{No. —} down to the time of the enfranchisement, ^{See Sec. 39} must be produced, ^{Cons: Act.} unless the enfranchisement is under the Copyhold Acts (*x*).

The period for deducing the title to an advowson is unaffected by the Vendor and Purchaser Act, 1874, as the act does not appear to relate to incorporeal hereditaments (other than, it is assumed, tithes in lay hands), and remains at one hundred years at least, and a list of the presentations during that period should accompany the abstract (*y*).

(*v*) *Pickering v. Lord Sherborne*,
1 *Craw. & Dix*, Abr. 254.
(*w*) *Sugd. V. & P.* 367.

(*x*) *Kerr v. Pawson*, 25 *Beav.* 394.
(*y*) *Sugd. V. & P.* 367; 3 & 4
Will. 4, c. 27.

The title to a reversionary interest should be deduced from a sufficiently remote period to show its creation, and it must be shown that the estate has been enjoyed in accordance with the terms of the creation thereof (s).

Where real or leasehold estate has been succeeded to upon the death of a person dying after the 19th of May, 1853, evidence of payment of succession duty should accompany the abstract (a).

(s) 1 Jarm. Con. by S. 61.

(a) 16 & 17 Vict. c. 51.

CHAPTER II.

INCIDENTS OF TITLE.

HAVING endeavoured to show the nature of the title which the purchaser may call for, we will proceed to consider the various incidents of title which suggest themselves on the investigation being entered upon.



SECTION 1.

Descent.

Descents which take place on the death of a person dying intestate since the 1st day of January, 1834, are now regulated by the act to amend the Law of Inheritance (a); and the rules of descent are now reduced as follows:—

1. Inheritances shall lineally descend to the issue of the last purchaser *in infinitum*, who is defined by the act to be the last person entitled to the land, unless it shall be proved that he inherited (b).

2. The male issue shall be admitted before the female.

3. Where there are two or more males in equal degree the eldest only shall inherit, but females alto-

(a) 3 & 4 Will. 4, c. 106.

(b) *Ib.* s. 1.

gether. Consequently, the issue of the eldest male would take, to the exclusion of the younger and his issue, the younger male and his issue taking to the exclusion of the females, who, on the death of the younger male without issue, would take in equal shares as coparceners.

4. The lineal descendants *in infinitum* of a person deceased shall represent their ancestor.

5. On failure of issue the inheritance shall descend to the purchaser's nearest lineal ancestor.

6. The father and all the male paternal ancestors of the purchaser and their descendants shall be the heir in preference to any of the descendants of such lineal ancestor and before any of the female paternal ancestors and their heirs; all the female paternal ancestors and their heirs before the mother or any of the maternal ancestors or her or their descendants; and the mother and all the male maternal ancestors and her and their descendants before any of the female maternal ancestors or their heirs.

7. A kinsman of the half-blood shall be capable of being heir, and shall inherit next after a kinsman in the same degree of the whole blood, and after the issue of such kinsman when the common ancestor is a male, and next after the common ancestor when such common ancestor is a female.

8. The mother of the more remote male paternal ancestor and her heirs shall be preferred to the mother of a less remote male paternal ancestor and her heirs.

By the stat. 22 & 23 Vict. c. 35, ss. 19, 20, it is enacted, that where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in such case the land shall descend, and the descent shall thenceforth be traced from the person last entitled to the land as if he had been the purchaser thereof.

From the foregoing it will be gathered that the person last entitled to the inheritance, whether he obtained possession thereof or not, is the party from whom the descent is to be traced, provided he did not inherit. Such person is styled the purchaser, the legal signification of the word "purchase" being defined by Littleton to be—possession to which a man cometh not by descent (*d*) ; and it may not be out of place to observe here, that a devisee of real estate takes by purchase, even though he may be the heir of the testator (*e*), and the property devised may have come to the testator by descent (*f*).

That the inheritance will descend to the issue of such person *in infinitum*, the descendant of a person deceased representing the ancestor, the eldest son and his issue taking before the younger sons and their issue, and the daughters taking in equal shares on failure of the issue of their brothers, as coparceners, the share of each daughter descending to her respective heirs.

(*d*) Litt. s. 12. (*e*) 3 & 4 Will. 4, c. 106. (*f*) 1 Vict. c. 26, s. 1.

On failure of the issue of the purchaser, the inheritance would go to his father, as the nearest lineal ancestor, before the brothers or sisters of the purchaser, who and whose issue would take after the father; the brothers and sisters of the whole blood to the purchaser taking before the brothers and sisters of the half-blood, the latter on the father's side taking next after the issue of the whole blood; and on failure of the issue of the father of the purchaser, the inheritance would continue to ascend thus: the grandfather, being the next lineal ancestor of the purchaser, would become entitled in preference to the uncles or aunts or their issue, who would take next after the grandfather of the purchaser, and so on until the male paternal lineal ancestors and their issue were exhausted.

On failure of the male paternal ancestors of the purchaser and their issue, the female paternal ancestors and their issue are next entitled, the mother of a more remote male paternal ancestor and her heirs taking before the mother of a less remote male paternal ancestor; thus the mother of the paternal grandfather and her issue being preferred to the father's mother and her issue.

And on failure of the female paternal ancestors of the purchaser and their issue, the mother of the purchaser and her heirs would become entitled to the inheritance.

Descents which took place before the act to amend the law of inheritance will be governed by the canons

of descent according to Blackstone, which are as follows :—

Rule 1. Inheritances shall lineally descend to the issue of the person who last died actually seised *in infinitum*, but shall never lineally ascend.

Rule 2. The male issue shall be admitted before the female.

Rule 3. Where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether.

Rule 4. The lineal descendants *in infinitum* of any person deceased shall represent their ancestor, that is, shall stand in the same place as the person himself would have done had he been living.

Rule 5. On failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the preceding rules.

Rule 6. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood.

Rule 7. In collateral inheritances the male stock shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the females, however near), unless where the lands have in fact descended from a female.



SECTION 2.

Devise.

The Wills Act (*g*), which came into operation on the 1st of January, 1838, enables every person to devise, bequeath or dispose by will of all real and personal estate which he shall be entitled to at law or in equity, which would otherwise devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, to the heir of his ancestor, or upon his executor or administrator; and the power thereby given extends to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that being entitled as heir or devisee or otherwise to be admitted thereto he should not have been admitted thereto, or notwithstanding that the same, in consequence of a want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if the act had not been made; and also to estates *pur autre vie*, whether there should or should not be any special occupant thereof, and whether the same should be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same should be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real or personal estate, whether the testator might or might not be

(*g*) 1 Vict. c. 26, s. 3.

ascertained as the person or one of the persons in whom the same respectively might have become vested, and whether he might be entitled thereto under the instrument by which the same respectively were created, or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator might be entitled at the time of his death, notwithstanding that he might become entitled to the same subsequently to the execution of his will.

No will made by an infant is now valid (*h*); neither is a will made by a married woman who was married before the 1st of January, 1883, the date at which the Married Women's Property Act, 1882, came into operation, except such a will as she might have made before the passing of the Wills Act, unless her title to the property included in such will shall have accrued after the 31st December, 1882 (*i*). This exception in the Wills Act enables a married woman to dispose of personal property held for her separate use, including savings of separate income, or to exercise a testamentary power of appointment over real and personal estate (*k*); also, if an executrix, to appoint an executor to continue the representation (*l*); and she may also dispose of real estate limited to her in fee simple for her separate use (*m*). As

(*h*) 1 Vict. c. 26, s. 7.

Wms. Exors. pt. 1, bk. 5, c. 2, s. 1.

(*i*) *Ib.* s. 8.

(*k*) *Prid. Con. tit. "Wills."*

(*m*) *Taylor v. Meads*, 34 L. J.,

(*l*) 2 Bright, H. & W. 66; 1

Ch. 203.

to women married after the 31st of December, 1882, the Married Women's Property Act, 1882, provides (sect. 2), that they shall be entitled to hold as their separate property, and to dispose by will or otherwise of all real and personal property which shall belong to them at the time of marriage, or devolve upon them after marriage; and as to women married before the 1st of January, 1883 (sect. 5), that they shall be entitled to dispose, as their separate property, of all real and personal property, their title to which shall have accrued after the 31st of December, 1882.

No will shall be valid unless signed at the foot or end thereof by the testator, or by some person in his presence and by his direction, and which signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary (*n*).

It will not be necessary that the testator actually sign in the presence of the witnesses, or even in express terms acknowledge the will, but such acknowledgment may be inferred from circumstances (*o*); but it must be clear that the testator must have signed before the witnesses attested (*p*).

No appointment made by will in exercise of a power shall be valid unless the same be executed in manner before required; and every will executed in manner

(*n*) 1 Vict. c. 26, s. 9.

Inglesant, 3 L. R., P. & M. 172.

(*o*) *Beckett v. Howe*, 2 L. R., P. & M. 1; *In Goods of Huckvale*, 1 L. R., P. & M. 375; *Inglesant v.*

(*p*) *Smith v. Smith*, 1 L. R., P. & M. 143; *Pearson v. Pearson*, 2 L. R., P. & M. 451.

before required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other solemnity (*q*); but a power of appointment to be exercised by a writing under the hand and seal of the person exercising it, will not be well exercised by a will, though executed according to the formalities of the Wills Act, if it be not also sealed (*r*). Where the appointment was directed to be made by deed or instrument in writing, signed, sealed and delivered by the party executing it, the power was held to be well exercised by the will of the appointor, which was not expressed to be delivered, but stated in the attestation clause to be signed, sealed, published, acknowledged and declared in the presence of the attesting witnesses (*s*); but a power of appointment by writing under hand or by will is not well exercised by a testamentary instrument unattested (*t*); and every will executed in manner before required is to be valid without further publication thereof (*u*); and if any person who shall attest the execution of a will shall, at the time of the execution or afterwards, be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid (*v*).

(*q*) 1 Vict. c. 26, s. 10.

Eq. 402.

(*r*) *West v. Ray*, Kay, 392;
Taylor v. Meads, 34 L. J., Ch.
 203.

(*t*) *Re Daly's Settlement*, 25
 Beav. 456.

(*u*) 1 Vict. c. 26, s. 13.

(*s*) *Smith v. Adkins*, 14 L. R.,

(*v*) *Ib.* s. 14.

And with regard to witnesses to a will, it is provided that a devise or bequest to a person attesting the execution of a will, or his or her husband or wife, shall be void; but such person shall be admitted as a witness (*u*); though where a legacy was given upon trust to a person whose wife was a witness to the will containing the bequest, such bequest was not invalidated by reason of such attestation (*x*). Creditors are also good witnesses, though the will contains a charge for payment of debts (*y*); and being appointed executor is not an objection to a witness (*z*); and the gift to a class as joint tenants, one of which is a witness, will not sever the joint tenancy, but the whole will go to the other members to the exclusion of the witness (*a*).

A will may be revoked by the marriage of the testator (*b*), except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin under the Statute of Distributions. A will may also be revoked by writing executed in the same manner as a will, and declaring an intention to revoke, or by burning, tearing or otherwise destroying the same by the testator, or by some person in his presence by his

(*u*) 1 Vict. c. 26, s. 15.

(*a*) *Young v. Davies*, 2 Drew.

(*x*) *Cresswell v. Cresswell*, 6 L.

& Sm. 167.

R., Eq. 69.

(*b*) 1 Vict. c. 26, s. 18; see

(*y*) 1 Vict. c. 26, s. 16.

Marston v. Roe, 8 Adol. & Ell. 14.

(*z*) *Ib.* s. 17.

direction, with the intention of revoking same (c); but cancelling a will will not revoke it, unless such cancellation be executed as a will. (Sug. Wills, 45.)

No conveyance or other act made or done subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (d); the provision, however, in the Wills Act does not affect the equitable rule treating property agreed to be sold as personalty (e), even though the devise be to a trustee upon trust for sale (f).

Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if executed immediately before the testator's death, unless a contrary intention shall appear by the will (g). A devise of all the lands whereof "I am now seised" has been held to be sufficient evidence of such a contrary intention (h); but a devise of all the lands of which "I am seised" has been held to pass after-acquired lands (i). The devise also of a house in which "A. now resides, with the appurtenances,"

(c) 1 Vict. c. 26, s. 20; *Andrew v. Motley*, 12 C. B., N. S. 514.

(d) 1 Vict. c. 26, s. 23.

(e) *Farrar v. Earl Winterton*, 5 Beav. 1; *Moor v. Raisbeck*, 12 Sim. 123; *In re Manchester and Southport Rail. Co.*, 19 Beav. 365.

(f) *Gale v. Gale*, 21 Beav. 349.

(g) 1 Vict. c. 26, s. 24.

(h) *Cole v. Scott*, 1 M. & G. 518.

(i) *Doe v. Walker*, 12 Mee. & Wels. 590; *Lady Langdale v. Briggs*, 8 De G., M. & G. 391.

was held to pass a piece of land subsequently purchased and attached to the house (*k*); and a devise of all the lands in a particular place has also been held to pass lands in that place subsequently acquired (*l*). A general devise will pass chattels real as well as real estates, unless a contrary intention appears (*m*).

Unless a contrary intention appear by the will, real estate comprised in a devise which shall fail by reason of the death of the devisee in the lifetime of the testator, or be otherwise incapable of taking effect, shall be included in the residuary devise (if any) included in the will (*n*), unless the devise be for an estate tail, in which case, if the devisee die in the lifetime of the testator leaving issue who would inherit under such entail, and any of such issue shall be living at the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*o*); or if the devisee, being a child or other issue of the testator, die in his lifetime leaving issue, any of whom are living at the testator's death (unless a life estate only has been given to the devisee), the devise shall take effect as mentioned in the former case (*p*); and a gift to a class

(*k*) *Re The Ockley and Ilkley* 372.
Rail. Co., 11 Jur., N. S. 818.

(*l*) *Lord Lilford v. Keck*, 30
Beav. 300.

(*m*) 1 Vict. c. 26, s. 26; and
see *Wilson v. Eden*, 5 Exch. 752;
and *Reeves v. Baker*, 18 Beav.

(*n*) 1 Vict. c. 26, s. 25.

(*o*) *Ib.* s. 32.

(*p*) *Ib.* s. 33; see also *Johnson*
v. Johnson, 3 Hare, 157; *Eccles*
v. Cheynes, 2 Kay & J. 676;
Griffiths v. Gale, 12 Sim. 354.

will take effect in favour of the survivors in the event of either of the members of such class dying before the testator (*q*).

In explanation of the Wills Act, as regards the position of the signature of the testator, an act has been passed (*r*) by which it is provided that every will, shall, so far only as regards the position of the signature of the testator or of the person signing for him, be deemed valid if the signature shall be so placed at or after, or following or under, or beside or opposite to, the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will; and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*s*), or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*t*) either with or without a blank space intervening, or shall follow or be after or under or beside the names or one of the names of the subscribing witnesses (*u*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or para-

(*q*) 1 Jarm. on Wills, 279; & M. 209.

Leigh v. Leigh, 23 L. J., Ch. 287.

(*t*) *In the Goods of Casmore*, 1 L. R., P. & M. 653.

(*r*) 15 & 16 Vict. c. 24.

(*u*) *In the Goods of Puddephatt*,

(*s*) *Hunt v. Hunt*, 1 L. R., P.

2 L. R., P. & M. 97.

graph or disposing part of the will shall be written above the signature (*v*), or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature (*w*): and the enumeration of the above circumstances is not to restrict the generality of the above enactment, but no signature is to be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made (*x*).

A general devise of real estate or a bequest of personalty will be construed to include in such devise or bequest any real or personal estate (to which the description contained in such bequest will extend) which the testator may have power to appoint in any manner he may think fit (*y*); and it has been held that a general power of appointment given to the survivor of several persons has been well exercised by a residuary devise in the will of the survivor, executed during the joint lives of such survivor and another of the persons to whom the power was limited who predeceased (*z*). A gift of residue has also been held to pass not only property over which a testator had a power of appointment at the time of making his will, but also property

(*v*) *In the Goods of Williams*, 1 L. R., P. & M. 4; *In the Goods of Coombs*, 1 L. R., P. & M. 302.

(*w*) *In the Goods of Archer*, 2 L. R., P. & M. 252.

(*x*) *In the Goods of Arthur*, 2 L. R., P. & M. 273.

(*y*) 1 Vict. c. 26, s. 27.

(*z*) *Thomas v. Jones*, 2 J. & H. 475.

over which he acquired a power after the date of his will (a); but this section of the Wills Act does not, however, apply to a power of appointment amongst children (b).

A general devise also includes the trust and mortgage estates of the testator, unless a contrary intention appears from the purposes and objects expressed in the will (c); and a gift of mortgages or securities for money will pass the legal estate in the mortgaged property, as well as the money secured, in the absence of a contrary intention (d). And where real estate is devised without words of limitation, such devise will be construed to pass the whole estate or interest which the testator had power to dispose of by will, unless a contrary intention appears (e).

Where real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication (f).

(a) *Turner v. Turner*, 21 L. J., Ch. 843; *Stillman v. Weedon*, 16 Sim. 26; *Cosfield v. Pollard*, 5 W. R. 774.

(b) *Cloves v. Audrey*, 12 Beav. 604.

(c) *Lord Braybroke v. Inskip*, 8 Ves. 41; *Marlow v. Smith*, 2 P. W. 197; *Sharpe v. Sharpe*, 12 Jur.

508; *Ex parte Shaw*, 8 Sim. 159.

(d) *Renvoize v. Cooper*, 6 Mad. 371; *Re Walker's Estate*, 21 L. J., Ch. 674; *King's Mortgage*, 5 De G. & Sm. 644; *Knight v. Robinson*, 2 K. & J. 503.

(e) 1 Vict. c. 26, s. 28.

(f) *Ib.* s. 30.

Where real estate shall be devised to a trustee without express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate or in the surplus rents and profits thereof shall not be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied (*g*).

A direction for payment of a testator's debts creates a charge for such payment on his real estate (*h*), unless, indeed, such direction is followed by a specific devise of property for paying debts, in which case the charge will be confined to the property devised for the purpose (*i*); but if there is an express charge of debts on real estate it will not be so confined, even though a fund be subsequently mentioned out of which the debts are to be paid (*k*), and a charge of debts confers on the executors an implied power of sale (*l*).

(*g*) 1 Vict. c. 26, s. 31.

(*h*) 2 Jarm. on Wills, 503; *Ball v. Harris*, 4 My. & Cr. 264; *Harding v. Gandy*, 1 Dr. & W. 430.

(*i*) *Palmer v. Graves*, 1 Keen, 545; *Thomas v. Britnell*, 2 Ves. sen. 313.

(*k*) *Wrigley v. Sykes*, 21 Beav. 337.

(*l*) *Storry v. Walsh*, 18 Beav. 559; *Satin v. Heape*, 29 L. J., Ch. 79; *Robinson v. Lowater*, 5 De G., M. & G. 272; but see *Colyer v. Finch*, H. of L. Ca. 905, in which Lord Cranworth observed, that in a case where an estate is devised to others, or to another, charged with certain payments, there the money is to

The Act to further amend the Law of Property and to relieve Trustees (*m*), to which we shall hereafter have occasion to refer, confers on devisees in trust to whom a testator dying after the 13th August, 1859, shall have devised real estate, charged with the payment of debts or legacies, a power to raise the same, notwithstanding the will may not contain any express power for the purpose (*n*). But if a testator creating such a charge shall not have devised the hereditaments so charged, the act confers the like power on his executors (*o*). And purchasers and mortgagees are not to be bound to inquire whether the powers thus conferred have been duly exercised by the persons acting in the exercise thereof (*p*). But these provisions are not to prejudice or affect any sale or mortgage made or to be made in pursuance of any will coming into operation before the passing of the act, nor are they to extend to a devise to any person in fee or in tail, or for the testator's whole estate or interest charged with debts or legacies, nor are they to affect the power of any such devisee to sell or mortgage as he or they may by law now do (*q*). In these cases the devisee may, in the exercise of his inherent right of alienation, either sell or mortgage the lands devised to him; but if legacies only are charged thereon the pur-

be raised through the instrumentality of a sale by the devisee, and that the devisee is the person, and the only person, that can make a legal title.

(*m*) 22 & 23 Vict. c. 35.

(*n*) *Ib.* ss. 14, 15.

(*o*) *Ib.* s. 16.

(*p*) *Ib.* s. 17.

(*q*) *Ib.* s. 18.

chaser or mortgagee is bound to see his money duly applied in their payment (*r*). But if the testator's debts are charged on the lands, then, whether there be legacies also charged or not, the practical impossibility of obliging the purchaser or mortgagee to look to the payment of so uncertain a charge exonerates him from all liability to do more than simply pay his money to the devisee on his sole receipt (*s*).

So far as real estate is concerned, a will does not require to be proved, but a will of personalty must be proved; and the Act to amend the Law relating to Probates and Letters of Administration in England (*t*) provides for the citation before the court of the heir at law of the testator and the devisees of his real estate, and such heir and devisees, when cited, will be bound by the proceedings (*u*).

It will be borne in mind, that what has hitherto been said in these pages upon the subject of devise has been with reference to the law as it has stood since the 1st of January, 1838, when the Wills Act came into operation.

At the time of the passing of this act, the law relating to wills of freehold estate was regulated by the Statute of Wills (*v*) and the Statute of Frauds (*w*), and

(*r*) *Horn v. Horn*, 2 Sim. & Stu. 448; *Wms. Real Assets*, p. 63.

(*s*) *Wms. Real Assets*, pp. 62, 63; *Corser v. Cartwright*, 8 L. R., Ch. 971; 7 L. R., H. L. 731.

(*t*) 20 & 21 Vict. c. 77.

(*u*) *Ib.* ss. 61, 62, 63.

(*v*) 32 Hen. 8, c. 1, explained by 34 & 35 Hen. 8, c. 5.

(*w*) 29 Car. 2, c. 3.

these statutes still regulate wills dated prior to the 1st of January, 1838.

By virtue of these statutes, a devising power was conferred over all freehold lands (*x*) which a testator possessed at the time of making his will, and such will was to be attested by three or four credible witnesses, and a bequest to a witness, or to the wife or husband of a witness, made such witness incredible, and the will became invalid if one of the three attesting witnesses took any beneficial interest thereunder. With a view to remedy this, an act (*y*) was passed, by which a witness to whom a gift was made was rendered credible and the gift only declared void, but the act did not extend to the case of a gift to the husband or wife of a witness, and such a gift therefore rendered the whole will void (*z*).

The Statute of Wills did not extend to copyhold or customary estates or to personal property, and until the passing of the Wills Act, a will of copyholds or of personal property did not require an attestation; and a testamentary instrument was supported, if reduced to writing by the testator's direction in his lifetime, even though the signature might be wanting (*a*). In some places there was a special custom to devise customary

(*x*) The Stat. of Wills authorized the disposition of two-thirds only of land held by knight service, but the stat. of 12 Car. 2, c. 24, abolished that tenure and converted all lands, with the excep-

tion of those of copyhold tenure, into lands of socage tenure.

(*y*) 25 Geo. 2, c. 6.

(*z*) 1 Jarm. on Wills, 65.

(*a*) *Ib.* 81.

freeholds, and even copyholds, directly by will, and the particular formalities to be observed were prescribed by the custom; but generally copyholds could only be disposed of by will by the surrender made by the testator in his lifetime to the use of his will, and any person to whom the estate might afterwards be given by will would then be entitled to be admitted on the testator's death pursuant to the surrender and will. This was a general custom applicable to all copyholds, and a special custom to the contrary could not be supported (*b*).

In order to remedy the evil which frequently arose in consequence of neglect to surrender to use of a will, an act (*c*) was passed, by which a devise of copyholds without any surrender to the use of the will was rendered as valid as if the surrender had been made, but customary freeholds were not within the act. An equitable interest in copyholds and customary freeholds might however be given by will, whether the legal estate might be given or not (*d*).

Until the Wills Act (*e*), rights of entry were not devisable (*f*), neither were estates *pur autre vie*; nor was real property which a testator acquired after the date of his will, unless the will were republished; and, conse-

(*b*) *Pike v. White*, 3 Br. Ch. Ca. 286; *Church v. Mundy*, 15 Ves. 396; *Doe v. Huntingdon*, 4 East, 271.

(*c*) 55 Geo. 3, c. 192.

(*d*) *Massey v. Grills*, Ambl. 299; *Doe v. Danvers*, 7 East,

299; *Davie v. Beversham*, 3 Cha. Rep. 4.

(*e*) 1 Vict. c. 26.

(*f*) *Goodright v. Forrester*, 8 East, 564; 1 Taunt. 578; *Doe v. Hale*, 2 Dowling & Ryl. 38.

quently, lands purchased after the date of the will did not pass without a republication, but would descend to the heir (*g*). And a testator having devised lands by his will, and afterwards disposed of them, they would not, on returning to his possession again, become subject to his will without a republication (*h*), the Statute of Wills regarding a will as a present conveyance; and a general devisee of lands took those lands only not otherwise disposed of, in the same manner as if they had been specifically devised to him; and if a devisee of lands died in the lifetime of the testator, the residuary devisee could not claim such lands, but they would descend to the heir-at-law.

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SECTION 3.

Entail.

The rule against perpetuities prevents the destination of an estate from being restricted for a longer period than a life or lives in being and twenty-one years afterwards, as also the period allowed for gestation if existing (*i*). The restriction on alienation is effected by limiting the estate to a living person for life, making the unborn children of such person tenants in tail; and such an estate, if left to itself, will devolve in a regular

(*g*) 1 Jarm. on Wills, 587,
1st ed.

(*h*) *Id.* 130.

(*i*) Fearne on Contingent Remainders, 430; *Cadell v. Palmer*,
7 Bligh, N. S. 202.

course of descent as long as the posterity of the tenant in tail continues.

The course of descent, however, seldom remains undisturbed for any length of time; the tenant in tail usually on the death of the tenant for life, if not before, availing himself of the power he possesses of placing the estate under his immediate control. This object was, previously to the Act for the Abolition of Fines and Recoveries (*k*), attained by means of suffering a recovery or levying a fine.

A recovery not only barred the issue of the tenant in tail, but also the persons entitled in reversion or remainder expectant on the determination of the estate tail; but it was necessary in the case of a recovery to obtain the concurrence of the immediate tenant of the freehold.

A fine, however, might be levied without such consent, and it would effectually bar the right of the issue of the tenant in tail, but on failure of such issue the reversioner or remainderman would become entitled, as their rights were not defeated by this species of assurance.

Since the passing of the Act for the Abolition of Fines and Recoveries, which took effect from the 31st of December, 1833, every actual tenant in tail, whether in possession, remainder, contingency or otherwise, has power to dispose (in the manner directed by the act), for an absolute estate in fee simple, or for any less

(*k*) 3 & 4 Will. 4, c. 74.

estate, of lands entailed, saying the rights of persons in respect of estates prior to the estate tail (*l*); but a contract for the sale of lands entailed, not completed in the lifetime of the tenant in tail, will be void as against the issue and those entitled in reversion or remainder (*m*); neither can an entail be barred with respect to estates tail granted by the crown as the reward of public services (*n*); or an entail *ex provisione viri*, under a settlement made before the passing of the act, without the assent theretofore required; but as to settlements made since the passing of the act the exception has been abolished. The act also prohibits a tenant in tail after possibility of issue extinct from barring the entail (*o*).

Power is also given to persons who would have been tenants in tail if the entail had not been barred and converted into a base fee, to dispose of the lands so as to enlarge the base fee into a fee simple absolute, but not to affect prior estates (*p*).

A disposition by a tenant in tail by way of mortgage, or for any other limited purpose, is an absolute bar in equity and at law to the extent of the estate created against all persons who, under the act, can be barred, notwithstanding any intention to the contrary may be expressed or implied in the deed (*q*).

(*l*) 3 & 4 Will. 4, c. 74, s. 15.

(*m*) Bac. Abr. tit. "Estate in Tail;" 3 & 4 Will. 4, c. 74, s. 40.

(*n*) 3 & 4 Will. 4, c. 74, s. 18.

(*o*) *Ib.*

(*p*) *Ib.* s. 19.

(*q*) *Ib.* s. 21.

The act abolishing fines and recoveries has introduced the office of protector, which generally exists during the continuance of those estates which may precede an estate tail.

If at the time when there shall be a tenant in tail under a settlement, there shall be under the same settlement any estate for years determinable on a life, or any greater estate (not being an estate for years), prior to the estate tail, then the owner of the prior or first estate, or who would have been so if no absolute disposition thereof had been made, shall be the protector of the settlement, and shall, for the purposes of the act, be deemed the owner of such prior estate, although the same may have been charged or encumbered, and although all the rents be exhausted or required for the payment of the incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner, or by his bankruptcy or insolvency, or by any other act or default of such owner. An estate by the curtesy in respect of such estate tail, or of any prior estate created by the same settlement, is to be deemed a prior estate, and a resulting use or trusts to or for the settlor is to be deemed an estate under the same settlement (*r*).

The act also provides for making each owner of an undivided share the protector of such share (*s*); so that if there are two tenants in tail, each may alone acquire

(*r*) 3 & 4 Will. 4, c. 74, s. 22.

(*s*) *Ib.* s. 23.

the fee in his moiety by virtue of the statute (*t*) ; and the husband and wife are made protectors where the wife, if single, would have been the protector in respect of a prior estate, unless settled to her separate use, in which case she alone is to be the protector (*u*) ; but where an estate is limited by a settlement by way of confirmation, or where the settlement merely has the effect of restoring the estate, such estate is, so far as regards the protector of the settlement, to be deemed an estate subsisting under such settlement (*v*). But a lease at a rent created or confirmed by a settlement shall not make the owner of it the protector (*w*), nor shall a woman in respect of dower (*x*) ; or a bare trustee, executor, administrator or assign be the protector ; but where there is more than one estate prior to an estate tail, and the owner of such estate is thus excluded from being protector, the person who, if such estate did not exist, would be protector, will be such protector (*y*).

A settlor entailing lands is empowered to appoint any person or number of persons, not exceeding three, to be protector in lieu of the person who would have been the protector if there had been no such appointment (*z*).

Should the protector be a lunatic, the lord chancellor, or other person for the time being entrusted with the care of lunatics, will be the protector in the place of such lunatic (*a*).

(*t*) *Church v. Edwards*, 2 Bro.
C. C. 180.

(*u*) 3 & 4 Will. 4, c. 74, s. 24.

(*v*) *Ib.* s. 25.

(*w*) *Ib.* s. 28.

(*x*) *Ib.* s. 27.

(*y*) *Ib.* s. 28.

(*z*) *Ib.* s. 32.

(*a*) *Ib.* s. 33.

No actual tenant in tail not having the remainder or reversion in fee immediately expectant on his estate tail under a settlement, where there is a protector, can dispose of the estate to the full extent authorized by the act without the consent of the protector; but he may, without such consent, dispose of the estate against all persons who, by force of any estate tail which shall be vested in or might be or have been claimed by him, shall claim the lands (*b*), and though the estate be converted into a base fee, yet, so long as there is a protector, his consent is requisite to the power of disposition given by the act. But where the tenant in tail becomes entitled to the reversion in fee, the base fee becomes enlarged into a fee simple (*c*).

The power and discretion of the protector as to his consent is absolute, and cannot be controlled, and any agreement entered into by him to withhold his consent is void, nor can his giving his consent be deemed a breach of trust (*d*). Neither are the rules of equity in relation to the dealings and transactions between a donee of a power, and any object of the power in whose favour the same may be exercised, to apply to this case (*e*).

The disposition for barring an estate tail must be by deed, and no disposition by will, or resting on contract, will be of any avail; and such deed (except a lease not exceeding twenty-one years at a rack rent, or not less than five-sixths of a rack rent) will be inoperative unless

(*b*) 3 & 4 Will. 4, c. 74, s. 34.

(*c*) *Ib.* ss. 35, 39.

(*d*) *Ib.* s. 36; and see 11 Sim.

527.

(*e*) 3 & 4 Will. 4, c. 74, s. 37.

enrolled in chancery within six months (*f*). And the concurrence of the husband of every married woman, being a tenant in tail, is necessary, and the deed must be acknowledged as in other cases (*g*); and the acknowledgment of a disentailing deed by a married woman may be taken subsequently to the enrolment of the deed, and after the expiration of the six months limited for enrolment (*h*).

The protector's consent is to be given by the same assurance by which the disposition is effected, or by another deed executed on or before the day on which the assurance is made, and the protector cannot revoke his consent (*i*). If the consent is given by a distinct deed, it must be enrolled at or before the time when the assurance of the tenant in tail is enrolled (*k*); and a married woman, who is protector, may consent to a disposition by the tenant in tail as if she were a *feme sole* (*l*).

Copyholds are within the act; but a disposition of an estate at law is to be made by surrender, and of an equitable estate by surrender or deed. Where the consent is given by deed, it must be executed by the protector and produced to the lord of the manor at or before the time when the surrender is made by which the disposition is effected, and then entered on the court

(*f*) 3 & 4 Will. 4, c. 74, ss. 40, 41.

(*g*) *Ib.* s. 40.

(*h*) *Ex parte Taverner*, 1 Jur.

N. S. 1194.

(*i*) 3 & 4 Will. 4, c. 74, ss. 42, 44.

(*k*) *Ib.* s. 46.

(*l*) *Ib.* s. 45.

rolls. And if such consent is not given by deed it must be given to the person taking the surrender by which the disposition is effected (*m*).

Equitable tenants in tail of copyholds are empowered to dispose of their interests by deed, in the same manner as freeholds, and the deed must be entered on the court rolls; and if a protector consent by a distinct deed, such deed must be executed by the protector on or before the day on which the disposition is executed by the equitable tenant in tail, and must be entered on the court rolls of the manor (*n*).

A disposition by a tenant in tail of either legal or equitable estate in copyholds requires enrolment on the court rolls only (*o*), and must be entered on the court rolls within six months after its execution (*p*).

Where an actual tenant in tail of lands becomes bankrupt, the commissioner acting in execution of the fiat is empowered by deed to dispose of the lands for the benefit of his creditors for such an estate therein as the tenant in tail might have disposed of if he had not been bankrupt; and if there is a protector of the settlement, the commissioner can only dispose of such an estate as the tenant in tail could have disposed of if the protector refuses his consent (*q*). Where the bankrupt is entitled to a base fee, the commissioner may dispose of it by deed if there is no protector, and by

(*m*) 3 & 4 Will. 4, c. 74, ss. 51, 52.

(*n*) *Ib.* s. 53.

(*o*) *Ib.* s. 54.

(*p*) *Honywood v. Foster*, 30 Beav. 1; *Gibbon v. Snape*, 2 N. R. 563.

(*q*) 3 & 4 Will. 4, c. 74, s. 56.

such disposition the base fee shall be enlarged into as large an estate as the same could have been enlarged into, at the time of the disposition, by the person entitled if he had not been bankrupt (*r*). And the act provides for the commissioner standing in the place of the tenant in tail, so far as regards the consent of the protector (*s*). And the deed executed by the commissioner and by the protector to a settlement must be enrolled within the time and in manner provided for in ordinary cases (*t*).

Base fees created by the disposition of, or sold or disposed of by, the commissioner on there ceasing to be a protector, will be enlarged to the same estate into which the same could have been enlarged if there had been no such protector (*u*).

The act also provides for the confirmation of voidable estates created by a tenant in tail, or by the commissioner in the case of a bankrupt tenant in tail, in favour of purchasers for a valuable consideration, but not as against purchasers for value without express notice of such voidable estates (*v*).

It is also provided that the disposition by the commissioner shall, if the bankrupt tenant in tail be dead, have the same operation in certain cases as if he were alive (*w*).

A disposition by the commissioner of copyhold lands where the estate is not equitable is to have the same operation as if the lands had been surrendered into the

(*r*) 3 & 4 Will. 4, c. 74, s. 57.

(*s*) *Ib.* s. 58.

(*t*) *Ib.* s. 59.

(*u*) *Ib.* ss. 60, 61.

(*v*) *Ib.* ss. 38, 62.

(*w*) *Ib.* s. 65.

hands of the lord; and the person to whom such lands have been disposed of may claim to be admitted on paying the fines, fees and dues which could have been demanded if the lands had actually passed by surrender (x).

“The Bankruptcy Act, 1869” (y), empowers the trustee (who is substituted by the act for the creditors’ assignee of former acts) to deal with any property to which a bankrupt is entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same; and it is enacted that sections 56 to 73, both inclusive, of the Act for the Abolition of Fines and Recoveries shall extend and apply to the proceedings in bankruptcy under the Bankruptcy Act as if those sections were there re-enacted and made applicable in terms to such proceedings (z).

The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), which comes into operation on the 1st of January, 1884, sect. 169, repeals the Bankruptcy Act of 1869; but by sect. 56, sub-s. 5, the above provision of the Bankruptcy Act, 1869, is re-enacted.

In cases where a person would be tenant in tail of lands directed to be purchased, if the money is to be produced by the sale of other lands, of whatever tenure those lands, and if not, the money is directed to be treated as the lands to be purchased; and if the lands directed to be sold are not copyhold, the provisions of the act are to apply as if the lands directed to be purchased were to be freehold and were actually purchased

(x) 3 & 4 Will. 4, c. 74, s. 66.

(z) 16. s. 25.

(y) 32 & 33 Vict. c. 71.

and settled; and where the lands directed to be sold are copyhold, the provisions are to apply as if the lands to be purchased were to be copyhold and actually purchased and settled; and, in the case of money, as if the same were to be laid out in the purchase of freeholds and they were actually purchased and settled; but leaseholds for years and money are to be treated as personal estate as to the person in whose favour the disposition is made (*a*); and the act provides for the manner in which such leasehold lands and money shall be assigned and disposed of in the case of bankruptcy (*b*).

In the case of an entailed estate *pur autre vie*, the quasi tenant in tail may bar his issue and all remainders by an ordinary conveyance, without enrolment under the act (*c*); but even a quasi entail cannot be barred by will (*d*). If the estate tail is in remainder expectant on an estate for life, the concurrence of the tenant for life is necessary to bar the subsequent remainders (*e*), but the tenant in tail can bar himself and his issue without such concurrence (*f*); and the renewal by the tenant in tail of a lease for lives will bar both the entail and remainders over, even though the surrendered lease may be vested in trustees who do not concur in the surrender (*g*).

(*a*) 3 & 4 Will. 4, c. 74, s. 71;
Re Smythe, 3 Myl. & Kee. 249.

(*b*) 3 & 4 Will. 4, c. 74, s. 71.

(*c*) *Fearne on Contingent Remainders*, 495.

(*d*) *Allen v. Allen*, 2 Dru. & War. 326.

(*e*) *Ib.*; *Wastney v. Chappell*, 3 Bro. P. C. 53, Tom. ed.

(*f*) *Allen v. Allen*, 2 Dru. & War. 326.

(*g*) *Campbell v. Sandyst*, Sch. & Lef. 295; *Grey v. Mennock*, 2 Eden, 339.

The two following sections of the Act for the Limitation of Actions and Suits relating to Real Property (*h*) may be appropriately quoted here, which, so far as these sections are concerned, is to be construed with the Real Property Limitation Act, 1874 (*i*). When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought by the period limited by the act which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred (*k*).

When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period limited by the act, which shall be applicable in such case for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent, but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action (*l*).

The Real Property Limitation Act, 1874 (*m*), after repealing a similar enactment in the former limitation

(*h*) 3 & 4 Will. 4, c. 27.

(*l*) *Ib.* s. 22.

(*i*) 37 & 38 Vict. c. 57, s. 9.

(*m*) 37 & 38 Vict. c. 57.

(*k*) 3 & 4 Will. 4, c. 27, s. 21.

act (*n*), provides that when a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof or at any time afterwards, be in possession or receipt of the profits of such land or be in receipt of such rent, and the same person or any other person whosoever (other than some person, entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be and be deemed to have been effectual as against any person claiming any estate, interest or right to take effect after or in defeasance of such estate tail (*o*).

By virtue of a statute of the reign of Henry the 8th (*p*), a tenant in tail could make a lease of lands, commonly let to farm for twenty years before, for a term not exceeding twenty-one years, or three lives,

(*n*) 3 & 4 Will. 4, c. 27.

(*p*) 32 Hen. 8, c. 28.

(*o*) 37 & 38 Vict. c. 57, s. 6.

from the day of making thereof, and the accustomed rent was to be reserved thereunder.

The Act for the Abolition of Fines and Recoveries (*q*) empowers a tenant in tail in possession to make leases by deed, without enrolment, for any term not exceeding twenty-one years, to commence from the date of the lease, or from any time not exceeding twelve calendar months from the date of the lease, reserving a rent which at the time of granting the lease, shall be a rack rent, or not less than five-sixths of a rack-rent (*r*).

And the Settled Estates Act (*s*), which repealed the above-mentioned statute of Henry the 8th, enacts, as to settlements made after the first of November, 1856, that any person entitled to the possession or receipt of any rents or profits of any settled estates for an estate for life or for any greater estate, may demise the same from time to time (unless the settlement shall contain a declaration to the contrary) for any term not exceeding twenty-one years, in such manner as by the act is prescribed (*t*). And the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), contains a similar provision.

SECTION 4.

Dower.

The right to dower, so far as regards women married since the 1st of January, 1834, is regulated by the Act

(*q*) 3 & 4 Will. 4, c. 74.

(*s*) 19 & 20 Vict. c. 120.

(*r*) *Ib.* ss. 15, 40, 41.

(*t*) *Ib.* ss. 32, 33.

to amend the Law relating to Dower (*u*), which provides that when a husband dies beneficially entitled to land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable or partly legal and equitable, shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy), then his widow shall be entitled in equity to dower out of the same land (*v*).

Where a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same if he had recovered possession thereof, she is to be entitled to dower out of the same, although her husband shall not have recovered possession thereof, provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced (*w*). It will thus be seen, that the widow must make her claim within the time allowed by the Acts for the Limitation of Actions and Suits relating to Real Property (*x*).

The widow will not be entitled to dower out of any land which shall have been absolutely disposed of by the husband in his lifetime or by his will (*y*), and all partial estates and interests, and charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his

(*u*) 3 & 4 Will. 4, c. 105.

(*v*) 3 & 4 Will. 4, c. 105, s. 2.

(*w*) *Ib.* s. 3.

s.

(*x*) 3 & 4 Will. 4, c. 27; and
37 & 38 Vict. c. 57.

(*y*) 3 & 4 Will. 4, c. 105, s. 4.

land shall be subject or liable, will be valid and effectual as against the right of his widow to dower (z).

The husband may also, either wholly or partially, deprive his wife of her right to dower by a declaration for that purpose made by him by any deed or by his will (a), which declaration, if contained in a conveyance, will be effectual even though the purchaser may not execute it (b). But in a case where a husband had purchased property before the year 1834, which was conveyed to him to the usual uses to bar dower, and the conveyance contained a declaration that his present or any future wife should not be dowable, it was held that his widow, to whom he was married after the 1st of January, 1834, was entitled to dower (c).

If the husband devises land to his widow, out of which she is dowable if the same had not been devised to her, her right to dower out of any of the lands of her husband is destroyed, unless the will provide to the contrary (d). But a gift of personalty for the benefit of the widow, or of lands not subject to dower, will not defeat the right of the widow unless a contrary intention be declared by the will (e). And the Dower Act provides, that nothing therein contained shall prevent a court of equity from enforcing any covenant or agreement entered into by the husband not to bar the right

(z) 3 & 4 Will. 4, c. 105, s. 5.

(a) *Ib.* ss. 6, 7, 8.

(b) *Fairley v. Twck*, 27 L. R.,
Ch. 28.

(c) *Fry v. Noble*, 20 Beav. 598;

7 De G., M. & G. 687; *Clarke v.*
Franklin, 4 K. & J. 266.

(d) 3 & 4 Will. 4, c. 105, s. 9.

(e) *Ib.* s. 10.

of his widow to dower out of his lands or any of them (*f*).

It will have been noticed, that the Dower Act only affects the rights of women married since the 1st of January, 1834, the rights of women married previously to that time remaining unaffected by the act. These rights rest on a firmer basis, and a woman cannot be barred of her dower without her consent. Until the Act for the Abolition of Fines and Recoveries (*g*), such bar was effected by means of a fine under which the wife was separately examined, and this method has now been superseded by the execution and acknowledgment in the manner prescribed by the act of the assurance of the property.

Dower under the old law, unless barred by one or other of the modes presently mentioned, attached in respect of all lands and tenements of which the husband became solely seised at any time during the coverture in fee simple or fee tail to which any issue which the wife might have had might possibly have been heir (*h*); but it has been held, that a widow was not entitled to dower out of property which might go to the heir if personal in its nature (*i*), or out of real estate, which, in equity, would go as personal estate (*k*); and it has been held to attach to an estate tail, even though the husband die without issue (*l*), and also to a base fee

(*f*) *B. s.* 11.

(*g*) 3 & 4 Will. 4, c. 74.

(*h*) *Blac. Com.* 131.

(*i*) 1 Bro. C. C. 377.

(*k*) *Phillips v. Phillips*, 1 My.

& Ke. 649.

(*l*) *Paine's case*, 8 Co. Rep. 36 a.

during its continuance (*m*), and seisin in law was as effectual as seisin in deed in order to render the wife entitled to dower.

also by
divorce -

Stephen v. Thompson

Dower is barred by a woman eloping from her husband, unless he is reconciled to her (*n*): but a divorce *a mensâ et thoro*, or (as it is now called) a judicial separation, will not bar dower (*o*); and if a doweress detain the evidence of title from the heir, she will be barred until she restore it (*p*); and until the recent act abolishing forfeiture for treason (*q*), the widow of a traitor was barred of dower (*r*).

Dower is also barred by jointure (*s*); but such jointure must take effect in possession immediately on the death of the husband, and must be at least for the life of the wife (*t*), and be made to the widow direct and not in trust for her, and it must appear by the deed creating the jointure to be in satisfaction of the whole dower (*u*). If the jointure be made after marriage, the wife may elect between her dower and her jointure (*v*); and if evicted from the jointure she is entitled to fall back upon her dower (*w*); and where the jointure is relied on in bar of dower a satisfactory title to the jointure land must be shown (*x*).

(*m*) *Doe d. Neville v. Rivers*, 7 Tr. 276.

(*n*) 2 Inst. 435; *Hetherington v. Graham*, 6 Bing. 135.

(*o*) Co. Litt. 33 a, 33 b.

(*p*) *Ann Bedingfield's case*, 9 Rep. 156.

(*q*) 33 & 34 Vict. c. 23.

(*r*) 5 & 6 Edw. 6, c. 11, s. 13.

(*s*) 27 Hen. 8, c. 10.

(*t*) Co. Litt. 36 b.

(*u*) *Tinney v. Tinney*, 3 Atk. 3.

(*v*) *Roper's Husband and Wife*,

468.

(*w*) 27 Hen. 8, c. 10, s. 7.

(*x*) Dart, V. & P. 514.

It was and still is the practice, in cases in which dower would attach under the old law, for a purchaser to take a conveyance of lands to uses to bar dower, which in old conveyances will be found to be as follows. The conveyance was made to the purchaser and his heirs, to the use of the purchaser and a trustee; the estate of the trustee being in trust for the purchaser. But this method was somewhat objectionable, as, in the event of the death of the trustee in the lifetime of the husband, he became solely seised, and dower attached; and so long as the trustee lived his concurrence was necessary in any disposition of the property. To remedy these objections the ordinary form of uses to bar dower have become introduced, and by which a grant is made to the purchaser and his heirs to such uses as he shall appoint, and in default of appointment and so far as same should not extend to the use of the purchaser and his assigns during his life without impeachment of waste, with remainder to the use of a trustee, his executors, administrators and assigns during the life of the purchaser in trust for him and his assigns, with remainder to the use of the purchaser, his heirs and assigns; and if the purchaser exercise the power of appointment to him reserved under these uses, the concurrence of the dower trustee is unnecessary; and in a case where the exercise of the power was omitted, an objection on the ground of non-concurrence by the trustee was considered by the court to be frivolous (y).

(y) *Collard v. Roe*, 4 De G. & J. 525.

If a term existed in lands to which dower attached, and such term was created prior to the seisin of a vendor thereof, or prior to his marriage, he could procure an assignment of the term to be made to a trustee for the purchaser, and thus defer the right of his wife to dower until the expiration of the term (z).

Dower by the old law was not subject to the husband's debts, even though due to the crown and contracted during the coverture (a); but it became, as we have seen, before the act (b) abolishing forfeiture for treason, forfeited in cases of treason. Jointure, on the other hand, was not affected by either of these circumstances, nor was the jointure impeached by the elopement or adultery of the wife (c).

The Settled Estates Act (d) empowers a tenant in dower to grant leases for a term not exceeding twenty-one years. And the Settled Estates Act, 1877, 40 & 41 Vict. c. 18, contains a similar provision.

SECTION 5.

Freebench.

Dower does not attach to copyhold lands, but somewhat similar in character is freebench, which is regulated by the custom of the manor of which the lands are

(z) *Toulmin v. Steere*, 3 Mer. 210; (c) Co. Litt. 37 a; *Sidney v. Dos d. Clay v. Jones*, 13 Jur. 524. *Sidney*, 2 P. Wms. 277.

(a) Co. Litt. 31 a.

(d) 19 & 20 Vict. c. 120, s. 32.

(b) 33 & 34 Vict. c. 23.

holden. By the custom of most manors, the right to freebench does not usually attach until the decease of the husband (*e*), and, consequently, he has in his lifetime complete power over the estate independently of the wife's concurrence; and a contract for sale will be enforced against the wife if the husband die before the sale is completed (*f*).

Freebench usually consists of a life interest in a third of the lands, though it sometimes extends to a life interest in the entirety (*g*), and is paramount to the debts of the husband (*h*).



SECTION 6.

Curtesy.

This right attaches in respect of such lands or tenements as a wife dies possessed and of which she was actually seised in deed during the coverture in fee simple or fee tail, or as tenant in common or in coparcenary, though not of land held in joint tenancy or of a reversion or remainder which does not fall into possession during the coverture, and it also attaches to the equitable estates of the wife. But to entitle the husband to curtesy, there must have been issue of the marriage born alive during the life of the wife which might

(*e*) 2 Watk. Cop. 73.

(*g*) 1 Scriv. Cop. 89.

(*f*) *Hinton v. Hinton*, 2 Ves.

(*h*) *Spyer v. Hyatt*, 20 Beav.

631; *Brown v. Randle*, 8 Ves. 621.
jun. 256.

possibly have inherited the estate (*i*), and the marriage must not have been void or avoided by a divorce (*k*).

Curtesy will also attach in respect of an equity of redemption (*l*) and to an estate limited to a wife for her separate use (*m*).

Curtesy does not attach to copyhold lands, except by force of a special custom (*o*). This right attaches only to such lands of a wife which do not come within the Married Women's Property Act, 1882, but the old law will still prevail as to the lands of women married before the 1st January, 1883, or of which no disposition may have been made by a wife under the powers conferred on her by the act.

The Settled Estates Act (*o*) enables a tenant by the curtesy to lease the lands for twenty-one years, subject to the restrictions contained in the act (*p*). And the Settled Estates Act, 1877, contains a similar provision.

See Oagar v Furnival.

Also Cooper v Macdonald

L.R. 7 Ch. D. 258.

SECTION 7.

Succession Duty.

Closely connected with those incidents of title just treated of is the duty imposed by the Succession Duty Act (*q*), which is to be taken as having come into

(*i*) Co. Litt. 29 a.

(*k*) *Remington v. Cole*, Noy, 29.

(*l*) *Osborne v. Scarfe*, 1 Atk. 603.

(*m*) *Roberts v. Dixwell*, 1 Atk.

(*n*) Watk. Cop. 71.

(*o*) 19 & 20 Vict. c. 120.

(*p*) *Id.* s. 32.

(*q*) 16 & 17 Vict. c. 51.

operation on the 19th day of May, 1853, under which every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of the act, either immediately or after any interval either certainly or contingently, and either originally or by way of substitutive limitation; and every devolution by law of any beneficial interest in property or the income thereof upon the death of any person dying after the time appointed for the commencement of the act to any other person in possession or expectancy, shall be deemed to have conferred or to confer upon the person so entitled by reason of any such disposition or devolution a succession (*r*); and a reversion which vests before the act, but does not come into possession until after the commencement thereof, is liable to duty (*s*). This section (second) has also been held to apply to all cases of succession which do not come within any other section of the act (*t*). The beneficial interest, however, must be an interest to which the successor has been entitled in possession; it must not be a mere apparenecy (*u*).

When persons have property vested in them jointly

(*r*) *Ib.* s. 2.

(*t*) *Re Lovelace*, 4 De G. & J.

(*s*) *Wilcox v. Smith*, 4 Drew.

340; *Att.-Gen. v. Gardner*, 32 L.

40; *Att.-Gen. v. Ld. Middleton*,

J., Ex. 84.

3 H. & N. 125; *Att.-Gen. v.*

(*u*) *Lord Advocate v. Stevenson*,

Gell, 3 H. & C. 615; *King v.*

1 L. R., H. L. S. C. 411.

Jarman, 14 L. R., Eq. 357.

by a title not conferring a succession, any interest accruing by survivorship is deemed a succession (*v*).

When a person has a power of appointment under a disposition of property taking effect on the death of a person dying after the time appointed for the commencement of the act, he shall, in the event of his making an appointment thereunder, be deemed to be entitled at the time of exercising the power to the interest appointed as a succession derived from the donor of the power; and where a person has a limited power of appointment under such a disposition, the person taking the appointed property will be deemed to take the same as a succession derived from the person exercising the power as predecessor (*w*).

Where the property is subject to a charge, estate or interest determinable by death or at any period ascertainable only by reference to death, the increase of benefit accruing to any person on the extinction or determination of the charge will be deemed a succession accruing to the person then entitled beneficially to the property or the income thereof (*x*); but a person entitled at the commencement of the act to real property subject to leases for lives, or for years determinable on life, is not liable to duty in respect of the determination of such leases in the event of the same occurring in his life (*y*).

(*v*) 16 & 17 Vict. c. 51, s. 3.

(*w*) *Ib.* s. 4.

(*x*) *Ib.* s. 5; *Att.-Gen. v. Upton*,

1 L. R., Ex. 224.

(*y*) *Ib.* s. 6.

Where any disposition of property not being a sale, and not conferring an interest expectant on death on the person in whose favour the same shall be made, is accompanied by a reservation or assurance of or contract for any benefit to the grantor or any other person for life, or for any period ascertainable only by reference to death, such disposition will confer, at the time appointed for the determination of such benefit, an increase in such beneficial interest in such property as a succession equal in annual value to the yearly value of the benefit so reserved (z).

Dispositions of property to take effect at a period ascertainable on death, and fraudulent dispositions made for evading duty, will confer successions (a).

Where reversionary property expectant on death is vested by alienation or other derivative title in any person, such person will be charged with duty at the same time and rate as the original successor would have been chargeable if there had been no alienation; and where any succession shall, before falling into possession, have become vested by alienation or any title not conferring a succession in any other person, the duty must be paid at the same rate and time as if there had been no such alienation; and where the title to any succession shall be accelerated by the surrender or extinction of any prior interest, the duty will be payable as if there had been no such acceleration (b); and leaseholds are to

(z) *Ib.* s. 7.(a) *Ib.* s. 8.

(b) 16 & 17 Vict. c. 51, s. 15;

Solicitor-Gen. v. Law Reversionary

be charged with succession duty instead of legacy duty (*c*).

The interest of a successor in real property is to be taken to be of the value of an annuity equal to the annual value of the property, and every such annuity must be valued according to the tables in the schedule annexed to the act; and the duty is to be paid by eight instalments, the first instalment to be paid at the expiration of twelve calendar months after the succession falls into possession, and the remaining seven instalments to be paid half-yearly; but if the successor die before the instalments have become due, the instalments not due at his decease will cease to be payable, except in the case of a successor who may have been competent to dispose by will (*d*) of a continuing interest in such property, in which case the instalments unpaid at his death will be a continuing charge on such interest in exoneration of his other property, and will be payable by the owner for the time being of such interest (*e*); and in the construction of this section of the act it has been held that the circumstance of a person becoming entitled and dying before all the instalments of duty are payable, being insane or a feme covert, does not exempt the estate of such person from the unpaid instalments (*f*), and the case of a tenant in tail who

Interest Society, 8 L. R., Ex. 233;

Att.-Gen. v. Lord Eustace Cecil,
5 L. R., Ex. 263.

(*c*) 16 & 17 Vict. c. 51, s. 19.

(*d*) *Att.-Gen. v. Hallett*, 2 H.
& N. 368.

(*e*) 16 & 17 Vict. c. 51, s. 21.

(*f*) *Att.-Gen. v. Hallett*, 2 H.
& N. 368.

disentails and acquires the fee, and dies before all the instalments have become payable, is not within the exemption (g).

In estimating the annual value of lands used for agricultural purposes, houses, buildings, tithes, teinds, rent-charges, and other property yielding or capable of yielding income not of a fluctuating character, an allowance is to be made of all necessary outgoings (h); but where the legal estate is vested in trustees, the parties beneficially interested will not be entitled to deduct as necessary outgoings expenses of management incurred by such trustees (i).

The duty imposed is a first charge on the interest of the successor, and of all persons claiming in his right, on all the real and personal property in respect whereof the same is assessed, while the same shall remain in the ownership or control of the successor, or of any trustee for him, or of his guardian, or committee, or tutor, or curator, or of the husband of any wife who shall be the successor, and the duty will be a debt due to the crown from the successor, having, in the case of real property, priority over all charges and interests created by him, but such duty does not charge or affect any real property of the successor other than the property comprised in the succession; and where any settled real estate comprised in a succession shall be

(g) *Att.-Gen. v. Ld. Lilford*, 34 L. J., Ex. 44.

(h) 16 & 17 Vict. c. 51, s. 22.

(i) *In re Eluces*, 3 H. & N. 719; *In the Matter of Earl of Cowley's Suc.*, 1 L. R., Ex. 288.

subject to any power of sale, exchange or partition, exercisable with the consent of the successor, or by the successor with the consent of another person, he will not be disqualified by the charge or duty on his succession from effectually authorizing by his consent the exercise of such power, or exercising any power with proper consent, as the case may be; and in such case the duty will be charged substitutively upon the successor's interest in all real property acquired in substitution for the real property before comprised in the succession, and in the meantime upon his interest, also in all moneys arising from the exercise of any such power, and in all investments of such moneys (*k*).

Every receipt and certificate purporting to be in discharge of the whole duty payable for the time being in respect of any succession, or any part thereof, will exonerate a *bonâ fide* purchaser for valuable consideration and without notice from such duty, notwithstanding any suppression or mis-statement in the account, upon the footing whereof the same may have been assessed, or any insufficiency of such assessment; and no *bonâ fide* purchaser of property for valuable consideration, under a title not appearing to confer a succession, shall be subject to any duty with which such property may be chargeable under the provisions of this act, by reason of any extrinsic circumstances of which he may not have had notice at the time of such purchase (*l*).

(*k*) 16 & 17 Vict. c. 51, s. 42.

(*l*) *Ib.* s. 52.

SECTION 8.

Possession.

In the consideration of title we have hitherto confined our remarks to title by purchase or descent, but there is another mode by which a title to property may be acquired, viz. possession, and such title is now regulated by the Act for the Limitation of Actions and Suits relating to Real Property (*m*), which came into operation on the 1st January, 1834, and the Act for the Further Limitation of Actions and Suits relating to Real Property (*n*), which came into operation on the 1st January, 1879 (*o*), and which acts are to be read and construed together, except so far as the first-named act is repealed by the latter (*p*).

After the 1st January, 1879, the period within which an entry or distress can be made, or an action or suit brought to recover land or rent, is limited to twelve years from the right having first accrued to the person making such entry or bringing such action or suit, or to the person through whom he claims (*q*), and the right will be deemed to have accrued at the time of dispossession or discontinuance of possession, or non-receipt of rent or profits; and when the interest claimed is a reversion or remainder, or other future estate or interest (in-

(*m*) 3 & 4 Will. 4, c. 27.

(*n*) 37 & 38 Vict. c. 57.

(*o*) *Ib.* s. 12.

(*p*) 37 & 38 Vict. c. 57, s. 9.

(*q*) *Ib.* s. 1; *Nepean v. Doe*, 4 Mee. & Wels. 494.

cluding an executory devise (*q*), such right shall be deemed to have first accrued when such estate or interest became an estate or interest in possession (*r*); and when such right accrues by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or condition broken (*s*), even though a previous forfeiture may have been waived (*t*), and although the party entitled, or the person through whom he claims, may have been in possession previously to the creation of the particular estate; but if the person entitled to the particular estate should not have been in possession when the interest determined, no such entry should be made or action or suit brought by the person entitled in possession but within twelve years after the right should have first accrued to the person whose interest should have determined, or within six years next after the time when the estate of the person entitled in possession should have become vested in possession, whichever period should be the longer; and if the right of such person should have been barred, persons claiming any subsequent interest in remainder will be barred also (*u*); but when the person entitled to the particular estate is the person entitled to the rever-

(*q*) *James v. Salter*, 3 Bing. 554.

(*r*) *Doe v. Edmunds*, 6 Mee. & Wels. 295; *Duke of Leeds v. Earl of Amherst*, 2 Ph. 125.

(*s*) 3 & 4 Will. 4, c. 27, s. 3;

Doe d. Johnson v. Liversedge, 11 Mee. & Wels. 517.

(*t*) 3 & 4 Will. 4, c. 27, s. 4.

(*u*) 37 & 38 Vict. c. 57, s. 2; and *Doe v. Edmunds*, 6 Mee. & Wels. 295.

sion, time will run against both estates, though there may be no merger (*v*), and a remainderman is not bound to enter for forfeiture until his estate falls into possession (*w*). The terms forfeiture and breach of condition in the sections 4 and 5 of the first-mentioned act (*x*), the latter of which sections has been repealed by the last-mentioned act (*y*), it has been recently held, are to be read in the largest sense, and extend to forfeitures which operate to accelerate an estate under a conditional limitation, as well as to forfeitures, of which the heir-at-law only can take advantage (*z*).

As against an administrator time will run from the death of the intestate (*a*).

The right of a person entitled, subject to a tenancy at will, will be deemed to have accrued either at the determination of such tenancy or at the expiration of one year next after the commencement of such tenancy, at which time the tenancy will be deemed to have determined; but no mortgagee or *cestui que trust* is to be deemed to be a tenant at will (*b*).

The right of a person entitled subject to a tenancy from year to year or other period, without any lease in writing, will be deemed to have accrued on the deter-

(*v*) *Doe v. Mouldale*, 16 M. & W. 689.

(*w*) Sugd. V. & P. 480.

(*x*) 3 & 4 Will. 4, c. 27.

(*y*) 37 & 38 Vict. c. 57, s. 9.

(*z*) *Astley v. Earl of Essex*, 18 L. R., Eq. 290.

(*a*) 3 & 4 Will. 4, c. 27, s. 6; *Holland v. Clark*, 1 Y. C. C. C. 151.

(*b*) 3 & 4 Will. 4, c. 27, s. 7;

Doe v. Thompson, 6 Ad. & E. 532;

Doe v. Rock, 4 Mann. & G. 30;

Day v. Day, W. R. 19, p. 1017.

mination of the first of such years or other periods, or at the last receipt of rent (*c*).

Where rent, by virtue of a lease in writing, amounting to twenty shillings per annum or upwards, shall be reserved, and such rent shall have been received by some person wrongfully claiming, the right of the person entitled to such land or rent, or of the person through whom he claims, will accrue at the time when the rent was first wrongfully received, and will not be deemed to have accrued on the determination of the lease; but there must be actual receipt of rent by a wrongful claimant (*d*); and receipt of rent through an agent, although the agent may be the person really entitled to the estate, will give the principal a possessory title (*e*). No person will be deemed to have been in possession by reason of having made an entry (*f*); nor will a right be preserved by continual claim being made upon or near such land (*g*); neither will possession of the entirety by one of several coparceners, tenants in common or joint tenants be deemed the possession of the person entitled (*h*); nor will the possession of the younger brother or other relation of the heir be deemed the possession of such heir (*i*).

Acknowledgment in writing, signed by the person in

(*c*) 3 & 4 Will. 4, c. 27, s. 8; and see *Doe v. Benham*, 7 Q.B. 976.

(*d*) 3 & 4 Will. 4, c. 27, s. 9; *Chadwick v. Broadwood*, 3 Beav. 308; but see *Ex parte Wood*, 4 Yo. & Col. 466.

(*e*) *Williams v. Pott*, 12 L. R., Eq. 149.

(*f*) 3 & 4 Will. 4, c. 27, s. 10.

(*g*) *Ib.* s. 11.

(*h*) *Ib.* s. 12.

(*i*) *Ib.* s. 13.

possession or receipt of the rent, of the title of the person entitled is equivalent to possession or receipt by such last-mentioned person (*k*), and time will run from such acknowledgment (*l*).

Should the person entitled to bring an action or suit, when such right first accrued, be under disability to sue by reason of infancy, coverture, idiocy, lunacy, or unsoundness of mind, six years are allowed from the time when such person shall have ceased to be under disability or shall have died, notwithstanding the period of twelve years or six years, as the case may be, allowed may have expired (*m*), and no time is to be allowed by reason of the absence beyond seas of the person entitled (*n*); but no action shall be brought beyond thirty years after the right has accrued (*o*), and no further time will be allowed for a succession of disabilities (*p*).

When the right to an estate in possession is barred, the right of the person entitled thereto and all persons claiming under him to any future estate is also barred, unless the land or rent is in the meantime recovered by some person claiming in right of some intermediate estate (*p*).

The right to bring a suit in equity for the recovery of land or rent is limited to the period within which a

(*k*) *Ib.* s. 14.

(*l*) *Burroughs v. M'Craith*, 1 J. & L. 290.

(*m*) 37 & 38 Vict. c. 57, s. 3.

(*n*) *Ib.* s. 4.

(*o*) *Ib.* s. 5.

(*p*) 3 & 4 Will. 4, c. 27, s. 18, as amended by 37 & 38 Vict. c. 57, s. 9.

(*p*) 3 & 4 Will. 4, c. 27, s. 20.

distress might have been made or action brought to recover the same at law (*q*).

In case of an express trust, the right will not accrue until the conveyance to a purchaser for value, and then only as against such purchaser (*r*); and time will not run against a remainderman until his right to possession accrues (*s*); but the provision has been held not to apply to a trust for payment of debts in a case where the creditors were not entitled to enforce the trust (*t*).

In case of a concealed fraud, the right to bring a suit in equity for the recovery of any land or rent will be deemed to have accrued at and not before the time at which such fraud shall, or with reasonable diligence might, have been discovered; but a *bona fide* purchaser for valuable consideration who has not assisted in the commission of such fraud, and who at the time of making the purchase had no notice thereof, will not be affected (*u*); though this saving will not extend to a purchaser for value who contracted through an agent who was aware of the fraud, though the purchaser personally had no knowledge thereof (*v*).

When a mortgagee has obtained possession or receipt of the profits of the land comprised in his mortgage, the right of the mortgagor to redeem will be barred at

(*q*) 3 & 4 Will. 4, c. 27, s. 24.

612.

(*r*) *Ib.* s. 25; *Att.-Gen. v. Flint*, 4 Hare, 147.

(*u*) 3 & 4 Will. 4, c. 27, s. 26; *Lewis v. Thomas*, 3 Hare, 26;

(*s*) *Thompson v. Simpson*, 1 Dru. & War. 459.

Blair v. Bromley, 2 Ph. 254.

(*v*) *Vane v. Vane*, 8 L. R.,

(*t*) *Evans v. Bagwell*, 2 C. & L.

Ch. 383.

the end of twelve years from such possession or receipt being taken, or next after a written acknowledgment of the title or right to redeem of the mortgagor shall have been given to him or his agent signed by the mortgagee (*w*).

A spiritual or eleemosynary corporation is not to recover any land or rent but within two successive incumbencies, and six years or sixty years, whichever be the longer period from the time when the right accrued (*x*).

The time for bringing an action or suit to enforce a right of presentation to a benefice is restricted to three successive adverse incumbencies, or sixty years, whichever is the longer period (*y*), reckoning therein incumbencies which have lapsed; but incumbency in consequence of promotion to a bishopric will be deemed a continuation of the incumbency of the clerk made bishop (*z*), and a claim in remainder to take effect after an estate tail will be considered as claiming through the person entitled to be tenant in tail (*a*); but no action or suit can be brought after adverse possession for 100 years, unless the benefice has been since held on the presentation or gift of the person entitled or some person through whom he claims (*b*).

The determination of the statutory limit will, in

(*w*) 37 & 38 Vict. c. 57, s. 7;
Hyde v. Dallaway, 2 Hare, 528;
Trulock v. Robey, 12 Sim. 402;
Lucas v. Dennison, 13 Sim. 584;
Stansfield v. Hobson, 16 Beav. 236.

(*x*) 3 & 4 Will. 4, c. 27, s. 29.
(*y*) *Ib.* s. 30.
(*z*) *Ib.* s. 31.
(*a*) *Ib.* s. 32.
(*b*) *Ib.* s. 33.

every case, bar the right of the person entitled to bring an action or suit for the recovery of land or rent, or an advowson, as well as the remedy (*b*).

The receipt of rent is, as against the person paying same, the receipt of the profits within the terms of the act (*c*).

No action or suit can be brought to recover money secured upon land, or any legacy, but within twelve years next after a present right to receive the same has accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some payment or acknowledgment in writing shall have been given by the person by whom the same shall be payable to the person entitled (*d*).

A share of residue is also within the above section (*e*), and an acknowledgment of the right of the party entitled by a trustee or his agent has been held to be sufficient (*f*); but absence beyond the seas is not a disability (*g*).

No arrears of dower, nor any damages on account thereof, can be recovered by action or suit for a longer period than six years before the commencement of such action or suit (*h*); nor can arrears of interest on a sum

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| (<i>b</i>) 3 & 4 Will. 4, c. 27, s. 34; | Cra. 309. |
| <i>Scott v. Nixon</i> , 3 Dru. & War. 388; | (<i>e</i>) <i>Christian v. Doveaux</i> , 12 |
| <i>Burroughs v. M'Creight</i> , 1 J. & L. | Sim. 264. |
| 290; <i>De Beauvoir v. Owen</i> , 5 Exch. | (<i>f</i>) <i>Lord St. John v. Boughton</i> , |
| Rep. 166. | 9 Sim. 219. |
| (<i>c</i>) 3 & 4 Will. 4, c. 27, s. 35. | (<i>g</i>) 19 & 20 Vict. c. 97, s. 10. |
| (<i>d</i>) 37 & 38 Vict. c. 57, s. 8; | (<i>h</i>) 3 & 4 Will. 4, c. 27, s. 41. |
| <i>Phillips v. Munnings</i> , 2 Myl. & | |

of money charged on land be recovered but within six years after the same became due, or has been acknowledged in writing by the person liable to pay the same to the person entitled (i); and the time for recovering charges and arrears of interest will not be enlarged by express trusts for raising same (k).

And when any prior incumbrancer has been in possession or receipt of rents or profits of land within one year before action or suit is brought by a person entitled to a subsequent incumbrance thereon, the subsequent mortgagee may recover the arrears which became due during the whole time the prior incumbrancer was in possession or receipt, although such time may have exceeded the term of six years (l).

Persons claiming any tithes, legacy or other property which might be recovered at law or in equity are subjected to the same period of limitation as the right to land (m).

For the provisions of the act affecting the rights of tenants in tail and remaindermen, see Sect. 3, *supra*.

The act may be shortly summarized by saying that the time of procedure for the recovery of real estate is limited to twelve years, with a saving of six years for

(i) *Paget v. Foley*, 2 Bing. N. C. 679; *Barrett v. Birmingham*, 1 Flan. & Kel. 556; see also 3 & 4 Will. 4, c. 27, s. 42.

(k) 37 & 38 Vict. c. 57, s. 10.

(l) 3 & 4 Will. 4, c. 27, s. 42; *Mellish v. Brooks*, 3 Beav. 22;

Hodges v. Croydon Canal Company, 3 Beav. 86; *Hughes v. Kelly*, 3 Dru. & War. 482.

(m) 3 & 4 Will. 4, c. 27, ss. 43, 44; *Dean of Ely v. Bliss*, 2 De G., M. & G. 459.

the disabilities mentioned in the act; but the entire period not to exceed thirty years, even if the six years have not expired, no time to be allowed for absence beyond seas, and barring the tenant in tail will operate to exclude those whom he might have barred.

Notwithstanding the first-mentioned statute, it has been held that a purchaser was entitled to a sixty years' title (*n*); and this doctrine, as modified by the Vendor and Purchaser Act, 1874 (*o*), will still hold good, the period however being reduced to forty years instead of sixty.

The several lengths of uninterrupted enjoyment which will confer a title in respect of rights of common, ways and watercourses, and the use of lights and other easements, is regulated by the Prescription Act (*p*), which act is unaffected by the Real Property Limitation Act, 1874 (*q*), which does not affect incorporeal hereditaments.

The Prescription Act provides that no claim to any right of common or other profit to be taken and enjoyed upon any land, except as in the act provided, and except tithes, rent and services, shall be defeated after thirty years' enjoyment by showing that profit or benefit was taken or enjoyed at any time prior to such period of thirty years; and when such right or profit shall have been enjoyed for sixty years, such right shall be deemed

(*n*) *Cooper v. Emery*, 1 Phil. 388.

(*o*) 37 & 38 Vict. c. 78.

(*p*) 2 & 3 Will. 4, c. 71.

(*q*) 37 & 38 Vict. c. 57.

absolute and indefeasible, unless taken and enjoyed by some consent or agreement in writing (r).

No claim to any way or other easement, or to any watercourse, or to the use of any water to be enjoyed over or from any land, shall be defeated after twenty years' enjoyment by showing the commencement prior to such period of twenty years, and when the same shall have been enjoyed for forty years, the right shall be deemed absolute and indefeasible, unless taken and enjoyed by some consent or agreement in writing (s).

When the access and use of light to and for any dwelling-house, workshop or other building shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, unless shown to have been enjoyed by consent or agreement in writing (t). And it is not necessary that such building should have been occupied, or indeed fit for occupation, to entitle the owner to maintain an action for the obstruction of its lights (u); but a right to access of light to a house cannot be acquired under this section by the lapse of time during which the owner of the house or his occupying tenant is also the occupier of the land over which the right would extend (v).

(r) 2 & 3 Will. 4, c. 71, s. 1.

(s) *Ib.* s. 2; *Tickle v. Brown*, 4 A. & E. 369; *Lawson v. Langley*, 4 A. & E. 890; *Parker v. Mitchell*, 11 A. & E. 788.

(t) 2 & 3 Will. 4, c. 71, s. 3; see as to this section *Flight v.*

Thomas, 11 Ad. & E. 695; *Mayor of London v. Pewterers' Company*, 2 M. & R. 409.

(u) *Constance v. Legh*, 4 L. R., Ex. 126.

(v) *Ladyman v. Grave*, 6 L. R., Ch. 763.

Each of the before-mentioned periods are to be deemed to be the period next before some suit or action wherein the claim, to which such period may relate, shall be brought in question, and no act shall be deemed an interruption within the meaning of the act unless the same shall be acquiesced in for one year after the party interrupted shall have notice thereof (*w*) ; but in order to negative such acquiescence, it is not necessary that the person interrupted should have taken any active steps to remove the obstruction, but it will be sufficient if he has in a reasonable manner communicated to the party causing the interruption that he does not acquiesce in it (*x*).

No presumption will be allowed in support of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period than such period mentioned in the act as might be applicable to the case and nature of the claim (*y*) ; and the time during which any person, otherwise capable of resisting any claim, shall have been under disability shall be excluded in the computation of the periods before mentioned (*z*).

When land or water upon or over which such way or watercourse shall have been enjoyed or derived, shall be held for any term exceeding three years from the

(*w*) 2 & 3 Will. 4, c. 71, s. 4 ;
Richards v. Fry, 7 Ad. & E. 698 ;
Parker v. Mitchell, 11 Ad. & E.
788.

(*x*) *Glouer v. Coleman*, 10 L. R.,
C. P. 108 ; see also *Smith v.*
Smith, 20 L. R., Eq. 500.

(*y*) 2 & 3 Will. 4, c. 71, s. 6.

(*z*) *Ib.* s. 7.

granting thereof, the time of enjoyment during such term shall be excluded in the computation of the period of forty years, in case the claim shall within three years after the determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (*a*).

The act 2 & 3 Will. 4, c. 100, limits the time of procedure in the case of moduses and exemptions from tithes.



SECTION 9.

Settlement.

Settlement is another incident of title to which reference should be made.

Persons who are competent to sell their property are competent to settle it (*b*), and further than this, infants, though not able to sell their property, can, under certain circumstances, make a valid settlement of it, for it is provided by a recent act of parliament (*c*) that every infant not under twenty if a male, and not under seventeen if a female, may make a binding settlement on his or her marriage, with the sanction of the Court of Chancery; though should a disentailing assurance have been executed by an infant tenant in tail under the provisions of the act, and the infant should afterwards

(*a*) 2 & 3 Will. 4, c. 71, s. 8.

(*c*) 18 & 19 Vict. c. 43.

(*b*) Atherley on Set. 11.

die under age, the disentailing assurance would there-upon become void (*d*).

A settlement of the real estate of a female infant, though made on her marriage, will not bind such estate unless made under the provisions of the act, though her husband will be bound if he executes it (*e*); and the same principle equally applies to the property of a male infant, whether real or personal (*f*), though the personalty of a female infant would be bound (*g*).

Marriage is a valuable consideration, and a settlement made previously to and in consideration of marriage will, so far as concerns the interests of those whose claims are within the marriage consideration (*viz.* the husband and wife and their issue), be supported against both purchasers and creditors; and a settlement though made after marriage, if made in accordance with articles executed previously to marriage, or if made of property impressed with a precatory trust existing before marriage, will in like manner be effectual: so also will a settlement made after marriage if made for any valuable consideration other than marriage, such as the payment of a portion; the giving up of an interest in the settlor's estate, or the like, if of sufficient amount (*h*); a covenant to indemnify the settlor against charges on the estate settled (*i*); or the advance of a sum of money to pay

(*d*) 18 & 19 Vict. c. 43, s. 2.

(*e*) *Cave v. Cave*, 15 Beav. 230.

(*f*) *Peachey*, 37.

(*g*) *Ib.* 38.

(*h*) *Atherley*, 151; *Teasdale v. Braithwaite*, 7 L. R., Ch. D. 630.

(*i*) *Townend v. Toker*, 1 L. R., Ch. 446; *Price v. Jenkins*, 7 L. R., Ch. D. 619.

outstanding charges on the property (*k*). The making of a settlement in consideration of marriage, however, is by the Bankruptcy Act, 1883, declared fraudulent in case the settlor is not at the time of the making thereof able to pay his debts without the aid of the property comprised therein; and if the settlor should become bankrupt, or compounds with his creditors, and it appears to the court that such settlement was made to defeat or delay creditors, or was unjustifiable, having regard to the settlor's affairs, his discharge may be suspended or refused, or the court may refuse to approve a composition or arrangement. These provisions, however, do not appear to render the settlement itself void or voidable. A settlement, however, not made for a valuable consideration is a voluntary settlement, and as such is liable to be defeated by creditors or *bonâ fide* purchasers for valuable consideration in certain events presently referred to; and trusts in a settlement made in contemplation of marriage in favour of the children of a future marriage or of collaterals are purely voluntary (*l*).

*As to Settlements liable to be defeated by the Creditors
of the Settlor.*

By stat. 13 Eliz. c. 5, the gift or alienation of any lands, tenements, or hereditaments, goods and chattels, made for delaying, hindering, or defrauding creditors, is

(*k*) *Bayespoole v. Collins*, 6 L. R.,
Ch. 228.

(*l*) *Wollaston v. Tribe*, 9 L. R.,
Eq. 44.

made void as against such creditors unless made upon good consideration and *bonâ fide* to a person not having at the time notice of such fraud.

The term "good consideration" in the statute means valuable, such as money or marriage, and does not include a meritorious consideration, as for love and affection (*n*).

The mere circumstance of a settlement being a voluntary one will not, except in cases coming within sect. 91 of the Bankruptcy Act, 1869 (*o*), render it void under the statute, if its object be not to defeat or delay existing creditors (*p*), and may be supported as against subsequent creditors if a fraud be not intended (*q*). The reservation of a power of revocation, or to mortgage or charge the property settled, would be a sign of fraud, and such a settlement could not be supported as against creditors (*r*); though a settlement to all appearance voluntary may be proved by extrinsic evidence to have been made for a valuable consideration (*s*).

The Bankruptcy Act, 1869 (*t*), provides that a voluntary settlement by a trader shall, if the settlor becomes bankrupt within two years from the date of the settlement, be void as against the trustee of the bankrupt,

(*n*) *Copis v. Middleton*, 2 Mad. 430.

(*o*) 32 & 33 Vict. c. 71.

(*p*) *Holmes v. Penney*, 26 L. J., Eq. 181; *Sagitary v. Hide*, 2 Vern. 43.

(*q*) *Stephens v. Olive*, 2 Bro. C. C. 90; *Holloway v. Millard*, 1

Mad. 414; *Lord Townsend v. Windham*, 2 Ves. sen. 11.

(*r*) *Tarback v. Marbury*, 2 Vern.

510; *Smith v. Hurst*, 10 Hare, 30.

(*s*) *Pott v. Todhunter*, 2 Coll.

276.

(*t*) 32 & 33 Vict. c. 71.

and shall, if he become bankrupt within ten years after the date of such settlement, be void as against such trustee, unless the parties claiming under it can prove that the settlor was at the time of making the settlement able to pay all his debts without the aid of the property comprised in such settlement. And it is also provided that any covenant or contract by a trader in consideration of marriage, for the future settlement upon or for his wife or children of any money or property wherein he had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, and not being money or property in right of his wife, should, upon his becoming bankrupt before such property or money had been actually transferred or paid pursuant to such contract or covenant, be void against the trustee in bankruptcy (u).

The Bankruptcy Act, 1869, has been repealed by the Bankruptcy Act, 1883, as from the 1st of January, 1884, which latter act, sect. 47, contains similar provisions to the foregoing, but extends them to all persons becoming bankrupt, and not, as in the Act of 1869, confines them to traders only.

*As to Settlements which are void against bonâ fide
Purchasers for Value.*

The 27th Eliz. c. 4, which does not apply to purely personal property, though it extends to chattels real (v),

(u) 32 & 33 Vict. c. 71, s. 91; Ch. D. 635.

In re Andrews' Trusts, 7 L. R., (v) Co. Litt. 3 b.

provides that conveyances of any estate in lands, tenements, or other hereditaments made with the intent to defraud purchasers, and conveyances of such estate made with any clause of revocation at the will of the grantor, are void against subsequent purchasers for value.

The principles upon which voluntary conveyances have been uniformly held to be fraudulent and void as against subsequent purchasers appear to be that, by selling the property for a valuable consideration, the vendor so entirely repudiates the former voluntary conveyance and shows his intention to sell, that it should be taken conclusively against him and the person to whom he conveys that such intention existed when he made the conveyance, and it was made in order to defeat the subsequent purchaser; but a voluntary settlement is binding as against the settlor, and cannot be defeated by him otherwise than by a sale for value (*w*); and such a settlement will in like manner be good as against the settlor, his heir or devisee, such heir or devisee being unable to defeat the settlement, even though he convey for value (*x*), and a mortgagee is a purchaser within the meaning of the statute (*y*).

Notwithstanding what has been premised, upon the defeazance of a voluntary settlement it is nevertheless very dangerous to take a conveyance from a person who has executed such a settlement (and, indeed, a voluntary

(*w*) *Doe d. Newman v. Rusham*, 105.
21 L. J., Q. B. 139. (*y*) 27 Eliz. c. 4; *Chapman v.*
(*x*) *Lewis v. Rees*, 26 L. R., Eq. *Ennis*, Comp. 281.

settlor cannot enforce a contract for purchase from him, though it may be enforced against him) (z), for matters may arise after the execution of such a settlement which will render it indefeasible; thus the person to whom the voluntary conveyance is made may sell for value, in which case it has been held that the purchaser for value cannot be defeated by a subsequent purchaser from the original settlor (a). Again, if a parent make a provision for a child under a voluntary settlement, and such child should marry, the marriage would make the settlement good, though it would have been bad as against subsequent creditors and purchasers if no marriage had taken place; for though the estate was not settled on the marriage, it may have been intended as an inducement to consent to the marriage; and it is now clearly established that a voluntary settlement followed by marriage cannot be impeached (b); and it has also been held that a post-nuptial settlement of the freeholds of the wife made for her benefit is not void under the statute (c).

A voluntary settlement, however, to be effectual, should be complete, and should not rest in contract, for an agreement to do an act when called upon, if simply

(z) *Buckle v. Mitchell*, 18 Ves. 100; *Smith v. Garland*, 2 Mer. 123; *Clarke v. Willott*, 7 L. R., Ex. 315. The principle that a voluntary settlor cannot enforce a contract for sale has been held not to apply where in a suit by him for specific performance the defendant, the purchaser, stated

he was willing to complete on having a good title. *Peter v. Nicolls*, 11 L. R., Eq. 391.

(a) *Prodgers v. Langham*, 1 Sid. 133.

(b) *Peachey*, 237, and cases cited.

(c) *Foster v. Foster*, 7 L. R., Ch. D. 87.

voluntary, cannot be enforced (*e*), unless the relation of trustee and cestui que trust be created (*f*); and a mere declaration of trust by the settlor, if complete, will be sufficient to create such relation (*g*). It has, however, been recently held, as an exception to the general rule, that specific performance of a contract cannot be enforced by volunteers; that a covenant by a widow on her second marriage to settle property for the benefit of her children by a former marriage, if made pursuant to an agreement between her and her intended husband, will be enforced at the suit of the children (*h*).

It is now well settled that a voluntary deed, purporting to be a complete transfer of property, though not effectual at law to pass it will be as effectual as a declaration of trust, and be binding in equity (*i*); but if the document purporting to be the deed of gift is of an incomplete testamentary character, it will not amount to a valid declaration of trust (*k*), and a settlor or his representatives cannot be compelled under the voluntary settlement to do any further act to render it binding (*l*); though it has been held in a case in which

(*e*) *Pownall v. Anderson*, 2 Jur., N. S. 857; *Antrobus v. Smith*, 12 Ves. 39.

(*f*) *Kekewich v. Manning*, 1 De G., M. & G. 188.

(*g*) *Ex parte Pye*, 18 Ves. 150.

(*h*) *Gale v. Gale*, 7 L. R., Ch. D. 144.

(*i*) *Airey v. Hale*, 3 Smale & Giff. 315; *Jones v. Lock*, 1 L. R.,

Ch. 25; *Richardson v. Richardson*, 3 L. R., Eq. 686; but see *Richards v. Delbridge*, in which this case was not followed.

(*k*) *Warren v. Rogers*, 16 L. R., Eq. 340.

(*l*) *Denning v. Hare*, 22 Beav.; *Heartley v. Nicholson*, 19 L. R., Eq. 233.

the voluntary deed contained a covenant for further assurance, and the estate of the settlor was administered in the Court of Chancery after his death, the volunteer was entitled to damages out of the estate for breach of the covenant (*m*).

Settlements of purely personal estate, unlike settlements of real estate, cannot be set aside by a disposition for value, but at once become binding upon the settlor and those claiming under him (*n*), and this rule has been extended to the case of a settlement made for an illegal consideration, which did not, however, appear on the face of the deed (*o*); but the settlement will be set aside if the illegal purpose fails to take effect (*p*).

- (*m*) *Coz v. Barnard*, 8 Hare, . Keen, 403.
310. (o) *Ayerst v. Jenkins*, 16 L. R.,
(*n*) *Newton v. Askew*, 11 Beav. Eq. 275.
145; *Bentley v. Mackay*, 15 Beav.
12; *Bridge v. Bridge*, 16 Beav. (p) *Symes v. Hughes*, 9 L. R.,
Eq. 475.
315; *Bill v. Cureton*, 2 My. &

CHAPTER III.

EVIDENCE OF TITLE.

HAVING considered the incidents likely to suggest themselves upon an investigation of title, we have now to ascertain the necessary evidence to be adduced in support thereof.

A will may now be evidenced with reference to both real and personal property by production of the probate, or an official copy (*a*). Previously to the act amending the law relating to probates and letters of administration, probate of a will, though usually accepted as sufficient evidence, was, in strictness, inadmissible (*b*); primary evidence is the will itself, which, so far as it affects real estate, need not be proved.

Abstracted deeds are usually proved by production of the originals. When it becomes necessary to prove them in the course of any judicial proceeding, they are proved by the attesting witness, unless such deeds are thirty years old and come from the proper custody, when the observance of all due formalities on their execution will be assumed without further proof. Documents are said to be in proper custody if they are in possession of the person with whom they would naturally be, and if any custody is proved to have had a

(*a*) 20 & 21 Vict. c. 77, s. 64.

(*b*) 4 Jarm. Con. by S. 178.

legitimate origin or the circumstances of the case render such an origin probable it will not be considered improper (c). The stamps should be examined, and it should be seen that all necessary parties have executed and that their signatures are attested, and as to deeds executed before the Conveyancing and Law of Property Act, 1881, if a money payment be the consideration, or form part of the consideration for their execution, a receipt should be endorsed upon or accompany the deed, the signature whereof should also be attested; but as to deeds executed after the commencement of the act, *i.e.*, the 1st January, 1882, it is provided by sect. 55, that a receipt in the body of the deed will be sufficient without any further receipt being endorsed thereon.

Where a document bears a date, it will be presumed to have been executed on the day of such date, and if more deeds of a series than one bear date on the same day they will be presumed to have been executed in the order necessary to effect the object intended to be attained (d); and where a document purporting to be a deed appears to have been signed and attested, it will be presumed to have been sealed and delivered, although no impress of a seal may appear (e).

Alterations and interlineations appearing in a deed are, in the absence of evidence to the contrary, presumed to have been made before the deed was executed (f);

(c) Best on Ev. s. 220.

B. 699.

(d) *Ib.* s. 403.

(f) *Doe v. Catamore*, 16 Q. B.

(e) *Hall v. Bainbridge*, 12 Q. 745.

though it is the reverse with regard to alterations and interlineations in wills (*g*).

Where a deed has been lost or destroyed, and the loss or destruction can be proved, secondary evidence of its contents may be given, accompanied by proof of the due execution of the deed (*h*).

A recital in a deed forty-four years old has been held to be good evidence of the contents and due execution of the deed so recited (*i*); and the recital of a deed is evidence of its existence as against the parties executing the deed in which it is recited and those claiming under them, but not of its contents, unless its loss or destruction be proved (*k*).

Should a deed be executed by an attorney, the power should be produced and, as to powers of attorney executed before the Conveyancing and Law of Property Act, 1881, evidence furnished that the constituent was alive when the deed was executed; and if the power were not executed for a valuable consideration, evidence should be furnished that it had not been revoked prior to the execution of the deed thereunder; though a trustee, executor, or administrator making a payment or doing an act *bonâ fide* under a power of attorney would not have been liable for the monies paid or the act done if the constituent were dead or had avoided

(*g*) *Simmons v. Rudall*, 1 Sim., N. S. 136.

(*h*) *Bryant v. Busk*, 4 Russ. 1; *Southby v. Hutt*, 2 M. & C. 207.

(*i*) *Moulton v. Edmunds*, 1 De G., F. & J. 246.

(*k*) *Burton's Comp.* 478.

the power, if at the time the power was exercised such trustee, executor, or administrator was not aware of the death of the constituent or the avoidance by him of the power (*l*); and the Conveyancing and Law of Property Act, 1881, sect. 47, provides that after the 1st of January, 1882, any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same. *See also Sec. 8 & 9 Con. A. 1882.*

Sect. 48 of the act provides for the deposit of original instruments creating powers of attorney in the central office of the Supreme Court of Judicature upon their execution being verified by affidavit, statutory declaration, or other sufficient evidence, and for the inspection and furnishing of office copies thereof.

Enrolled deeds may be evidenced by production of certified copies of the originals, if such originals are not in the possession of the vendor; but if in the possession of the vendor, the originals should be produced.

Fines are proved by production of the chirograph, or an exemplification under the seal of the court, or an examined copy proved by the oath of the examiner (*m*).

(*l*) 22 & 23 Vict. c. 35, s. 26.

(*m*) Burton's Comp. 487.

A recovery is proved by an exemplification or a copy examined with the roll (*n*).

Certificates of birth, death or marriage obtained from the proper register should be produced in support of these facts, and should be verified by statutory declarations of disinterested persons acquainted with the facts certified; and certified copies of non-parochial registers deposited in the hands of the registrar are now made evidence (*o*).

When a title depends on a claim by descent, the pedigree must be proved by certificates of birth, marriage and death of persons through whom the claim is traced and who, if living, would have been entitled, and by the wills and grants of administration of persons whose devisees would have been entitled before the heir, to show that these persons left no such devisees. In the absence of sufficient evidence of this nature, it must be completed by extracts from deeds or wills of relations, and extracts from parish books, family bibles, old books and papers, inscriptions on tombstones, or declarations of competent persons (*p*); and proof of failure of issue must be shown to verify a pedigree where prior estates are alleged not to have vested for default of such issue (*q*).

Articles for a settlement before marriage, in pursuance whereof settlements have been made after mar-

(*n*) Burton's Comp. 490.

(*o*) 3 & 4 Vict. c. 92, s. 9.

(*p*) Prid. Con. tit. "Abstract."

(*q*) Prid. Con. tit. "Abstract;"

see also *Howarth v. Smith*, 6 Sim.

171.

riage, should be abstracted as well as the settlements, in order that it may be seen that the articles were duly carried into effect (*r*); though it is immaterial if both the articles and settlement were made before the marriage, and the settlement does not purport to be made in pursuance of the articles (*s*).

Seisin may be presumed from facts tending to show that the ancestor or testator appeared to be the owner, such as by production of leases granted by him under which possession has been taken by the lessee (*t*), and by grant of an annuity by a person in possession, which stated that a certain person was the legal owner of the fee (*u*), or by production of receipts for rent given to persons proved to have been in the occupation of the premises, or by the declaration of such occupiers, that they held of the party whose possession is sought to be proved; but occupation, although sufficient to raise a presumption of title in ejectment, does not have that effect as between vendor and purchaser (*v*); and when a person seised or entitled has died intestate, letters of administration in proof thereof should be produced.

The Vendor and Purchaser Act, 1874 (*x*), provides that recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments,

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| (<i>r</i>) <i>Prid. Con. tit. "Abstract."</i> | (<i>u</i>) <i>Doe v. Coulthred</i> , 7 Ad. & |
| (<i>s</i>) <i>Legg v. Goldwin</i> , 1 White & | El. 235. |
| <i>Tu. L. C., Eq. 17.</i> | (<i>v</i>) <i>Doe v. Penfold</i> , 8 Car. & P. |
| (<i>t</i>) <i>Clarkson v. Woodhouse</i> , 5 | 536; see also 13 Ves. 122. |
| <i>T. R. 412; Welcome v. Upton</i> , 6 | (<i>x</i>) 37 & 38 Vict. c. 78, s. 2, |
| <i>M. & W. 536.</i> | r. 2. |

acts of parliament or statutory declarations twenty years old at the date of a contract should, unless and except so far as they should be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters and descriptions. So that recital of seisin of a particular person in a deed twenty years old, in the absence of proof to the contrary, would be evidence thereof; and it is a very common practice to introduce such recitals in conveyances and mortgages with that view. And the Conveyancing Act, 1881, s. 3, sub-s. 3, provides that it shall be assumed, unless the contrary appears, that recitals, contained in abstracted instruments, of any deed, will or other document, forming part of a title prior to the time prescribed by law or stipulated for the commencement of title are correct, and give all material contents of the deed, will or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, enrolment or otherwise.

*Also a Copy
purportedly to be
issued from H.M.
Stationary Office
Doc: Evidence
act 1882 -*

A Queen's printer's copy of an act of parliament should be produced for evidencing title derived under such a document; and the 8 & 9 Vict. c. 113, s. 3, renders it unnecessary to prove that the copy so produced was printed by the Queen's printer.

Upon a sale of copyholds, the title is proved and the abstract verified by production of the steward's copies of the court rolls.

On the sale of leasehold property which has been

specifically bequeathed, proof should be furnished of the assent of the executor to the bequest, and the last receipt for rent should be produced. Should the lease contain a covenant on the part of the lessee to insure the property, a policy of insurance in accordance with the covenant should be produced. By a recent act of parliament (*y*), *bonâ fide* purchasers were protected against any breach of the covenant committed before completion of the purchase of which they had no notice, where they are furnished with a receipt for the last payment of rent, and an insurance was subsisting in conformity with the lessee's covenant to insure; but this provision has now been repealed by the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 7, and more extensive provisions made for the protection from forfeiture by persons claiming under leases and underleases already or hereafter to be granted; and it is now provided by the Conveyancing and Law of Property Act, 1881, s. 14, sub-s. 1, that a right of re-entry or forfeiture, under any stipulation, in a lease for a breach of covenant or condition, shall not be enforceable until the lessor serves on the lessee a notice specifying the breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy same, and in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter to remedy it, if it is capable of

(*y*) 22 & 23 Vict. c. 35, s. 7.

*In sec. has no applica-
tion to the case of a
lease for years.
This sec. applies
to a lease for years
or a lease for years
or a lease for years
or a lease for years*

remedy, and to make reasonable compensation in money, to the satisfaction of the lessor for the breach ; but this provision does not extend to a covenant or condition against assigning, underletting or parting with the possession or disposing of the land leased, or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest (sub-s. 6).

We have seen that, under the Wills Act (z), an appointment by will executed according to the formalities prescribed by the act, so far as respects the execution and attestation thereof, is a valid execution of the power after the act coming into operation, notwithstanding the observance of other formalities may have been required by the document creating the power ; and by a recent statute (a), a deed executed thereafter in the presence of two or more witnesses in the manner in which deeds are usually executed and attested, shall, so far as respects the execution and attestation thereof, be a valid execution of a power by deed or instrument not testamentary, notwithstanding that such deed or instrument may require some other form of execution ; but with reference to appointments executed prior to these acts, it is necessary that the prescribed formalities should have been observed (b).

The Bankruptcy Act, 1869 (c), provides, that petitions, orders, certificates, deeds and other instruments,

(z) 1 Vict. c. 26.

(b) *Ib.* s. 12.

(a) 22 & 23 Vict. c. 35.

(c) 32 & 33 Vict. c. 71.

or copies of them, and affidavits or documents made or used in the course of any bankruptcy proceedings are to be receivable in evidence if under the seal of the court, or purporting to be signed by any judge having jurisdiction in bankruptcy (*d*). This act, as we have seen, has now been repealed, but the Bankruptcy Act of 1883, sect. 134, contains a provision to the like effect. When, therefore, the title depends upon bankruptcy, the abstract should be verified accordingly. Proceedings in insolvency should be verified by certified copies of such proceedings (*e*).

Where property is sold as free from land tax, the redemption of the land tax should be shown by production of the certificate of the land tax commissioners, with the receipt of the cashier of the Bank of England and memorandum of registration (*f*). A few words here respecting the land tax may not be out of place.

Land tax is chargeable under 38 Geo. 3, c. 5, and was, until the statute 38 Geo. 3, c. 60, an annual impost only. The last-named act provided for the redemption and purchase of the tax, but land tax purchased thereunder continued payable to the receiver-general, and was by him paid to the purchaser, to whose personal representatives it devolved on his decease.

This act was repealed by the 42 Geo. 3, c. 116,

(*d*) 32 & 33 Vict. c. 71, s. 107.

by 24 & 25 Vict. c. 134.

(*e*) See Insolvent Acts, 1 & 2 Vict. c. 110, s. 105; 5 & 6 Vict. c. 116, s. 11; 7 & 8 Vict. c. 96, s. 37. Insolvent Court abolished

(*f*) 42 Geo. 3, c. 116, s. 38; and see *Buchanan v. Poppleton*, 4 Jur., N. S. 414.

under the provisions of which (as altered by the subsequent acts of 43 Geo. 3, c. 51; 45 Geo. 3, c. 77; 46 Geo. 3, c. 133; 50 Geo. 3, c. 58; 53 Geo. 3, c. 123; 54 Geo. 3, c. 73, and 57 Geo. 3, c. 100) the land tax is now redeemable; the act also provides for the purchase of the land tax, extending the privilege to persons neither the owners of nor interested in the lands chargeable, upon purchase whereof the lands become exonerated from the tax and chargeable with a fee farm rent in lieu thereof equal to the amount of the land tax purchased, which fee farm rent will devolve as real estate.

An act (*g*) has been passed reducing the price of redemption fixed by the 42 Geo. 3, c. 116,—17*l.* 10*s.* per cent.,—and by a subsequent act (*h*) the right to purchase or redeem is restricted to persons having an interest in the property (*i*); but the act provides that upon completion of any redemption after the passing of the act (which came into operation on the 20th of August, 1853) the property shall be wholly freed and exonerated from the land tax and from any yearly rent-charge in respect of the consideration (*k*); but this section of the act has since been repealed by another act so far only as relates to contracts entered into after the passing of such act (*l*), which came into operation on the 29th July, 1856. It will thus be seen that

(*g*) 16 & 17 Vict. c. 74.

(*h*) *Ib.* c. 117.

(*i*) *Ib.* s. 1.

(*k*) *Ib.* s. 2.

(*l*) 19 & 20 Vict. c. 80, s. 3.

transactions which took place between the passing of the last-mentioned acts are unaffected by the latter act, and the tax has consequently merged.

Where a tenant for life, or any other particular interest, redeems the tax out of his own pocket, the charge to which he is entitled under the 42 Geo. 3, c. 116, is personal estate (*m*), and without some evidence of intention will not merge if he becomes entitled to the fee simple (*n*).

Discharges for legacies or other sums charged upon land must be produced, notwithstanding twelve years may have elapsed since they became payable, as the claims may still subsist in consequence of incompetency of the person entitled or an intermediate acknowledgment may have been given (*o*).

A seller cannot himself prove a fact upon which the title depends (*p*), though in practice a purchaser is frequently content to take a statutory declaration by a vendor as evidence of facts within his knowledge.

Prior to the Conveyancing Act, 1881, the absence of or deficiency in proof of the existence or due execution of material instruments, presumption that such instruments did exist and were duly executed was admissible as between vendor and purchaser if possession had been consistent with the *prima facie* title. And, as a general

(*m*) 19 & 20 Vict. c. 80, s. 123.

(*n*) *Trevor v. Trevor*, 2 Myl. & K. 675; *Ex parte Phillips*, 19 Ves. 118.

(*o*) 37 & 38 Vict. c. 57, s. 8;

see also *Cooke v. Soltan*, 2 Sim. & Stu. 154.

(*p*) *Hobson v. Bell*, 2 Beav. 17.

rule, a purchaser would be bound to admit such presumptions, which a judge in a court of law would direct the jury to presume, though not such matters as would be left to the finding of the jury. The same rule also would seem to apply to matters of fact as between vendor and purchaser. (See Mr. Dart's elaborate dissertation on presumptions and the cases there cited. Dart's Vendors and Purchasers, tit. "Abstract.") And as we have before seen, it is now provided by the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 3, that a purchaser shall assume, unless the contrary appears, that recitals contained in abstracted documents forming part of a prior title are correct, and give the material contents thereof, and that they were duly executed and perfected.

PART II.

OF CONTRACT AND MATTERS RELATING THERETO.

CHAPTER IV.

FORM OF AND PARTIES TO CONTRACT.

SECTION 1.

Form of Contract.

THE form of a contract for sale and purchase will necessarily vary according to the nature of the title of the proposed vendor and the evidence thereof in his possession or power. If he has a root of title forty years old (*a*), showing the seisin of the person then alienating, and all due formalities have been observed in the transfer of the estate from and to the various owners who have preceded the person selling, and if such person is in a position to furnish the necessary evidence for deducing his title, or, being a trustee for sale, has a valid power enabling him in that behalf, with a power to give sufficient discharges for the purchase-money, the contract need contain no more than the agreement for sale and

(*a*) 37 & 38 Vict. c. 78, s. 1.

purchase, the description of the estate, and fix the time for completion.

It is, however, very rarely the case that the state of the title of the proposed vendor is such that he is in a position to enter into an open contract, and if he is well advised he will be protected by such restrictive stipulations as his position with regard to title and evidence of title may warrant, care being taken to avoid the insertion of special conditions for which there is no necessity (and which, indeed, if he be acting in a fiduciary character, he must not do), and confining the restrictive stipulations in the contract to such as will be sufficient to protect him from unnecessary expense; but, above all things, to abstain from offering a property for sale where the title is so defective that it cannot even with restrictive stipulations be forced upon a purchaser, as such a course has in numerous instances been the cause of the defects being brought to the knowledge of those to whose interest it has been to take advantage of them.

SECTION 2.

Statute of Frauds.

The Statute of Frauds (b) enacts that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or interest in or concerning them, unless the agreement

(b) 29 Car. 2, c. 3.

upon which such action shall be brought or some memorandum thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized (c).

The person authorized for this purpose may be appointed by parol (d), but he cannot bind the principal further than the authority given him will extend (e); and if he exceeds his authority he will himself be liable, though the principal will not (f). The agency may be revoked at any time prior to the signature of the agreement (g).

The names of the contracting parties must be contained in the agreement, or there must be such a description of them that there cannot be any dispute as to their identity (h). But it has been recently held, that where the vendor was not named, but described as a trustee selling under a trust for sale, this was a sufficient description within the statute (i). So also where the vendor was called the proprietor (k).

The contract will be binding though unsigned by the purchaser (l), and if one party to the contract only be bound he may require the other to assent or dissent

(c) 29 Car. 2, c. 3, s. 4.

(d) Prid. Con., tit. "Agrt."

(e) *Olding v. Smith*, 16 Jur. 497; *Chinnock v. Marchioness of Ely*, 11 Jur. 329.

(f) Ambl. 498; 10 Ves. jun. 400; *Spedding v. Nevell*, 4 L. R., C. P. 212; *Godwin v. Francis*, 5 L. R., C. P. 295.

(g) Prid. Con., tit. "Agrt."

(h) *Sale v. Lambert*, 18 L. R., Eq. 1; *Potter v. Duffield*, 18 L. R., Eq. 4; *Commins v. Scott*, 20 L. R., Eq. 11.

(i) *Catling v. King*, 5 L. R., 1 Ch. D. 660.

(k) *Ib.* 648.

(l) Sug. V. & P. 129.

therefrom in writing, and unless this is done he may rescind (*m*).

The whole contract must be in writing, and must comprise the whole terms agreed upon, or refer to some written document which does so (*n*); and where another document is so referred to, parol evidence will be admitted to identify it (*o*). An entire agreement for sale of real and personal estate, part of which is within the statute and void, cannot be supported as to the part not within the statute (*p*).

It has been decided that sales by auction are within the statute, and that the auctioneer is the agent for both vendor and purchaser (*q*). Should the highest bidder be an agent, the signature by the auctioneer of the agent's name will be binding on the principal (*r*).

The receipt of a vendor, or on a sale by auction the auctioneer's receipt, for the purchase-money or deposit, or a minute of the sale in the auctioneer's book, is sufficient if the receipt states the price or is so framed that the price may be collected from it (*s*).

(*m*) 2 Jac. & W. 428. See also *Lord Ormond v. Anderson*, 2 Ba. & B. 371.

(*n*) *Dobell v. Hutchinson*, 3 Ad. & Ell. 355; *Powell v. Dillon*, 2 Ball & B. 416; *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Ridgway v. Wharton*, 6 Ho. of L. C. 38.

(*o*) *Morris v. Wilson*, 5 Jur., N. S. 168.

(*p*) *Cooke v. Tombs*, 2 Anst. 420; *Lord Falmouth v. Thomas*, 1 Crom. & Mee. 89.

(*q*) Sug. V. & P. 42.

(*r*) *White v. Procter*, 4 Taun. 209; *Kenworthy v. Schofield*, 2 B. & C. 945.

(*s*) *Emmerson v. Heelis*, 2 Taun. 38; *Gosbell v. Archer*, 2 Ad. & E. 500; *Clerk v. Wright*, 1 Atk. 12.

Letters will constitute an agreement (*t*) if they specify the terms thereof (*u*), and the contracting parties are named, even though it may be provided that a more formal agreement shall be prepared and signed by both parties (*x*).

The offer must not contemplate a subsequent arrangement of terms (*y*), nor must the acceptance of an offer to make it binding be accompanied by a formal agreement with conditions of a special character (*z*). It has, however, been held in a recent case where an agreement for a lease of a house provided for the preparation and approval of a formal contract, and another contract was not entered into, that there was no final agreement of which specific performance could be enforced against the defendant (*a*); nor was specific performance of a contract for the purchase of a lease enforced where it was made subject to the approval of the title by the purchaser's solicitor, and he, without *mala fides*, disapproved of it (*b*).

When letters form the agreement they should be stamped, but where in the course of proceedings in

(*t*) *Holland v. Eyre*, 2 Sim. & Stu. 194; *Smith v. Surman*, 9 Barn. & Cresswell, 561; *Routledge v. Grant*, 4 Bing. 653.

(*u*) *Ogilvie v. Foljambe*, 3 Mer. 53; *Boyce v. Green*, Batty, 608; *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(*x*) *Fowle v. Freeman*, 9 Ves. 351; *Kennedy v. Lee*, 3 Mer. 441;

Thomas v. Dering, 1 Keen, 729.

(*y*) *Manley v. Dowdeswell*, 10 L. R., C. P. 102.

(*z*) *Crossley v. Maycock*, 18 L. R., Eq. 180.

(*a*) *Winn v. Bull*, 7 L. R., Ch. D. 1, 29.

(*b*) *Hudson v. Buck*, 7 L. R., Ch. D. 1, 683.

equity an agreement was admitted by the answer, the admission was held sufficient without stamping (c).

If a contract or note in writing exists which binds one party to a contract, a subsequent note in writing signed by the other party is sufficient to bind him, provided it either contains in itself the terms of the contract or refers to any writing which does so (d).

A letter containing an offer will bind the writer from the time it is posted (e), although it may not be received until the following day (f), and an offer having been made may be varied or retracted before its acceptance (g). If the person making the offer require its acceptance by a particular day, the acceptance thereof will be binding on him though he may not receive it until after the day named, if the delay has been occasioned by the post-office or by the misdirection of the letter (h).

Should the offer be rejected it cannot be revived by tendering an acceptance (i).

The answer to a written offer must be a simple acceptance of the proposal without any variation (k), and should the letter containing the proposal require the party to whom such proposal is made to supply a term

(c) *Huddleston v. Briscoe*, 14 Ves. jun. 583.

(d) *Dobell v. Hutchinson*, 3 Ad. & Ell. 355.

(e) *Thomas v. Blackman*, 1 Coll. 301.

(f) *Potter v. Sanders*, 6 Hare 1.

(g) *Honeyman v. Marriott*, 6 H. of L. Ca. 112.

(h) *Adams v. Linsell*, 1 B. & Ald. 681.

(i) *Hyde v. Wrench*, 3 Beav. 334.

(k) *Holland v. Eyre*, 2 Sim. & Stu. 194.

in the agreement, there must be a special acceptance in writing of the term supplied (*l*).

A contract for the sale of grass, wood or fruit as growing produce is a contract for sale of an interest concerning land. But a contract for the sale of grass, wood or fruit when severed, or by the terms of the contract intended to be severed from the freehold; or of other produce not arising spontaneously but by labour and industry, whether growing or severed, is not a contract for the sale of an interest concerning land (*m*).

Although under sect. 2 of the Statute of Frauds a lease for a term not exceeding three years, at a rent of two-thirds at least of the improved value, may be made by parol, an agreement for the sale of such a lease must be in writing (*n*).



SECTION 3.

Parties under Disability in Selling and Purchasing Land.

The proposed vendor and purchaser should be capable of selling and purchasing real estate, and not only

(*l*) *Boys v. Ayerst*, 6 Madd. 316.

(*m*) *Parker v. Staniland*, 11 East, 362; *Warwick v. Bruce*, 2 Mau. & Selwyn, 205; *Dunn v. Ferguson*, Hayes, 540; *Mayfield v. Wadsley*, 3 B. & C. 357; *Crosby*

v. Wadsworth, 6 East, 602; *Scorell v. Boxall*, 1 Y. & J. 396; *Rodwell v. Phillips*, 9 M. & W. 501; *Smith v. Surman*, 9 B. & C. 829.

(*n*) *Barrett v. Rolph*, 14 M. & W. 348.

so but should be in such a position that their contracts may not be avoided by reason of any disability such as infancy, coverture, lunacy, or the like.

An infant cannot enter into a binding contract for the sale or purchase of lands, nor can he sue for the specific performance of such a contract during his infancy (*o*); and on attaining his majority he might until recently have avoided or confirmed it, his representatives having the like privilege should he die under age (*p*). It is now, however, provided by the Infants' Relief Act, 1874 (*q*), that no action shall be brought whereby to charge any person upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age (*r*). But by the custom of gavelkind, a tenant of an estate of freehold may, at the age of fifteen, dispose of his estate by feoffment (*s*).

An infant cannot take advantage of his own fraud (*t*); and if an infant contracts for purchase of an estate and pays a deposit, and on attaining his majority refuses to complete the purchase, he cannot recover the deposit unless fraud was practised in procuring it from him (*u*).

(*o*) *Flight v. Bolland*, 4 Russ. 298.

(*p*) *Clayton v. Ashdown*, 9 Vin. Abr. 393.

(*q*) 37 & 48 Vict. c. 62.

(*r*) *Ib.* s. 2.

(*s*) 2 Bl. 84.

(*t*) *Overton v. Bannister*, 3 Hare, 503; *Wright v. Snow*, 2 De G. & Sm. 321.

(*u*) *Ex parte Taylor*, 8 De G., M. & G. 257. See also Sugd. V. & P. 209.

By the Married Women's Property Act, 1882 (*x*), every woman who shall marry after the 31st of December, 1882, is entitled to hold as her separate property, and to dispose of by will or otherwise in the same manner as if she were a *feme sole*, all real and personal property which shall belong to her at the time of her marriage, or shall be acquired by or devolve upon her after marriage. And every woman married after the 31st of December, 1882, is entitled to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, accrues after the 31st of December, 1882.

Formerly a married woman could not dispose of her lands, even with her husband's consent, without the necessity of a fine, after being examined separately and apart from her husband, in order that it might be ascertained that her act was voluntary, though she could deal with property limited to her separate use as if she were a *feme sole* (*y*), and a power given to an unmarried woman could be exercised by her as well after marriage as before, without the concurrence of her husband (*z*).

The statute for the Abolition of Fines and Recoveries prescribes the mode in which a woman married before the Married Women's Property Act, 1882, can dispose of her real estate acquired before the act, and empowers a married woman to dispose by deed of lands of any

(*x*) 45 & 46 Vict. c. 75, s. 2. 64.

(*y*) *Jude v. Bubb*, 7 L. R., Ch.

(*z*) 1 Sugd. Pow. 182, 7th ed.

tenure and money subject to be invested in the purchase of lands, and to dispose of, release, surrender or extinguish any estate or interest therein which she alone, or she and her husband in her right, might have in any such lands or money, and to release and extinguish powers as if she were a *feme sole*, provided her husband concurs and the deed is duly acknowledged; but it is provided, that the act shall not apply to an estate at law in copyholds in cases in which any of the objects to be effected by the above clause could, previously to the act, have been effected by her with the concurrence of her husband by surrender (*a*), and this section of the act has been held to apply to a contingent remainder in lands (*b*), and to an interest in the proceeds of sale of real estate directed to be sold, whether in possession or reversion (*c*), but not to a reversionary interest in a mortgage debt on real estate (*d*).

The act prescribes the manner and before whom the acknowledgment is to be taken, and empowers the Court of Common Pleas to make rules from time to time touching the acknowledgments of married women, which powers have been exercised by the rules of Hilary Term, 1834, which, amongst other things, direct that one at least of the commissioners appointed under the act for taking acknowledgments shall be a

(*a*) 3 & 4 Will. 4, c. 74, s. 77. Hare, 69; *Franks v. Bollans*, 3

(*b*) *Crofts v. Middleton*, 8 De L. R., Ch. 717.

G., M. & G. 192.

(*d*) *In re Newton's Trusts*, W.

(*c*) *Briggs v. Chamberlain*, 11 N. 1882, 186.

person not interested in the transaction or concerned therein as attorney, solicitor, agent, or as clerk to any attorney, solicitor or agent so interested or concerned. But a subsequent act has been passed (*e*), which provides that no deed acknowledged or to be acknowledged by a married woman shall be impeached at any time after the certificate of acknowledgment has been filed of record in the Court of Common Pleas, by reason only that the judge, master in Chancery or commissioners, or either of them, was or were interested or concerned in the transaction giving occasion for such acknowledgment, either as a party or parties, or as attorney or solicitor, or clerk to the attorney or solicitor, of one of the parties or otherwise; and the Conveyancing Act, 1882 (*f*), renders one commissioner only requisite for taking the acknowledgment, and provides that such acknowledgment shall not be impeachable by reason only that the judge or commissioner taking same is interested (*g*).

A married woman seised at law of an estate in copyholds, acquired before the Married Women's Property Act, 1882, can, with the consent of her husband, pass the estate by surrender; but if the estate be equitable, the assurance thereof may be by surrender or deed acknowledged as in the case of freeholds (*h*).

A husband may dispose of a term of years belonging to his wife, which is not subject to the Married Women's

(*e*) 17 & 18 Vict. c. 75.

(*f*) 45 & 46 Vict. c. 39.

(*g*) *Id.* s. 7.

(*h*) 3 & 4 Will. 4, c. 74, ss. 77, 90.

Property Act, 1882, either absolutely or by way of mortgage (i); but, if he does not exercise such power, it will pass upon the death of either husband or wife to the survivor without the necessity of taking out administration, but the husband can dispose of the wife's term by will (k). The power of the husband extends to reversionary and contingent interests (l), unless the interest is such that it cannot vest in the wife during coverture in possession (m). If the interest is equitable, the wife must concur in and acknowledge the deed disposing thereof, in order to bar her equity to a settlement (n).

Before the Married Women's Property Act, 1882, a married woman might deal with property limited to her separate use as if she were a *feme sole* (o); and a power given to an unmarried woman could be exercised by her as well after marriage as before, without the concurrence of her husband (p); but now as regards the property of a married woman coming within the operation of the act, as we have seen, such property, whether real or personal, may be disposed of as if she were a *feme sole*, and consequently neither the consent of the husband nor acknowledgment of the assurance containing such disposition will be necessary.

(i) *Hill v. Edmonds*, 5 De G. & S. 603, 607.

(k) *Doe d. Shaw v. Steward*, 1 Ad. & Ell. 300; *Doe v. Hart*, 3 Russ. & Myl. 360.

(l) *Donne v. Hart*, 2 R. & M. 360.

(m) *Duberley v. Day*, 16 Beav. 33.

(n) *Hanson v. Keating*, 4 Hare, 1.

(o) *Prid. Conv.*, tit. "Purchase Deeds;" *Jude v. Bubb*, 7 L. R., Ch. 64.

(p) 1 Sugd. Pow. 182, 7th ed.

A married woman who does not come within the operation of the Married Women's Property Act, 1882, is not absolutely incapacitated from purchasing land, but if she does purchase, her husband during his life, or her representatives after her death, may annul the purchase if not made out of her separate estate (*q*). And, under the Married Women's Property Act, 1870, leaseholds to which a woman, married after the 9th August, 1870, became entitled during her marriage as next of kin, or one of the next of kin, of an intestate, would, without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use (*r*); but this act has now been repealed (except as to rights acquired thereunder) by the Married Women's Property Act, 1882, which act, as we have seen, contains more extensive enactments in favour of married women.

Persons of unsound mind are incapacitated from making a binding disposition of any estate in lands, but an executed contract entered into *bonâ fide*, and in the ordinary course of business, is not void by reason of one of the parties having been at the time of the contract of unsound mind, where such unsoundness is not known to the other party (*s*).

Prior to the Naturalization Act, 1870 (*t*), which act, however, is not retrospective (*u*), land purchased by an

(*q*) Dart, V. & P. 28.

Deeds."

(*r*) 33 & 34 Vict. c. 93, s. 7.(*t*) 33 Vict. c. 14.(*s*) *Moulton v. Camroux*, 4 Ex.(*u*) *Sharp v. St. Sauveur*, 7 L.

17; Prid. Con. tit. "Purchase

R., Ch. 343.

alien would have been forfeited to the crown, who, after office found, might have seized the lands accordingly (*x*) ; but before office found an alien might make a conveyance to a natural-born subject, but such conveyance, though a valid disposition, did not defeat the prior rights of the crown, which still continued. And if lands were devised to a trustee for an alien the trust would have been executed for the benefit of the crown (*y*). But a devise of lands to trustees, to sell and to pay the proceeds to the alien, was good (*z*).

An act was passed (*a*) which empowered an alien residing in any part of the united kingdom, and being the subject of a friendly state, to obtain all the rights and capacities (with some trifling exceptions) of a natural-born subject, and he was then in a position to hold and dispose of land as if he had been born in this country.

The same act enabled any such alien to take a lease for twenty-one years for the purpose of residence or occupation by himself or his servants, or for the purpose of any business, trade or manufacture (*b*) ; but now real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject. And a title to real and personal property of

(*x*) Co. Litt. 2b.

(*z*) *Du Hourmelin v. Sheldon*, 1

(*y*) *Barron v. Waadkin*, 24 Beav. 79.

(*a*) 7 & 8 Vict. c. 66.

Beav. 1.

(*b*) *Ib.* s. 5.

every description may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to a natural-born British subject (*c*).

Persons acting in a fiduciary character, such as trustees, assignees (or, as they are now called, trustees) in bankruptcy, committees of lunatics, executors, and other persons occupying a position with reference to the property or affairs of another inconsistent with the duties or interests of a purchaser, cannot themselves purchase the property with which they are thus connected or entrusted (*d*). Thus mortgagees selling under a power of sale, an arbitrator contracting for unascertained claims of parties to the reference (*e*), commissioners for inclosure under a General Inclosure Act, who cannot purchase land in a parish in which an inclosure is made until five years from the date and execution of their award (*f*), or valuers acting under the Commons Inclosure Act, who are under a similar disability for the term of seven years (*g*), are all unable to purchase the property with which they are thus fiducially connected. A mortgagee may, however, purchase from a mortgagor, or a mere dry trustee may purchase from his *cestui que trust* (*h*), and a trustee may purchase from the *cestui*

(*c*) 33 Vict. c. 14, s. 2.

(*e*) *Blennerhassett v. Day*, 2 Ba.

(*d*) *Adhearn v. Hogan*, 1 Dru.

& B. 116.

310; *Greenlaw v. King*, 3 Beav.

(*f*) 41 Geo. 3, c. 109, s. 2.

49; 9 Ves. 248; 10 Ves. 381,

(*g*) 8 & 9 Vict. c. 118, s. 129.

393. See also Sugd. V. & P.

(*h*) *Parkes v. White*, 11 Ves.

11th ed. 890; *Tate v. Williamson*,

226; *Knight v. Majoribanks*, 2

2 L. R., Ch. 255.

Mac. & Gor. 10.

que trust if the relation of trustee and *cestui que trust* be previously dissolved, or the parties may agree to stand with reference to each other in the character of vendor and purchaser (i).

A solicitor may purchase from his client, but it is essential that the client should be advised by some disinterested solicitor, and it would rest with the solicitor purchasing to prove that he gave an adequate consideration (k); but to set aside a sale to a solicitor by his client, the proceedings must be commenced within a reasonable time (l).

A relative of a disqualified person may purchase *bonâ fide* on his own account (m), and the court will in the absence of fraud decree a specific performance at the suit of a purchaser (n).

A tenant for life under a settlement, whose consent is necessary to the exercise of a power of sale by the trustees, may nevertheless purchase from them under the power (o).

Corporations cannot hold land unless authorized by

(i) *Gibson v. Jeyes*, 6 Ves. 277; *Montesquieu v. Sandys*, 18 Ves. 302; *Coles v. Trecothick*, 9 Ves. 247.

(k) *Edwards v. Meyrick*, 2 Hare, 63; *Holman v. Loynes*, 23 L. J., Ch. 529; *Gibbs v. Daniel*, 4 Giff. 1; *Dally v. Worham*, 33 Beav. 154. See also *Guest v. Smythe*, 5 L. R., Ch. 551; *Pisan v. Att.-Gen. for Gibraltar*, 5 L. R., P. C.

516.

(l) *Marquis of Clanricarde v. Heming*, 30 Beav. 175.

(m) *Ferraby v. Hobson*, 2 Ph. 261.

(n) *Prestage v. Langford*, 3 Mood. 248; *Coles v. Trecothick*, 9 Ves. 234.

(o) *Howard v. Ducane*, Turn. & R. 81; *Dicoonson v. Talbot*, 6 L. R., Ch. 32.

act of parliament, or licence obtained by them for that purpose (*p*). And a company registered under the Joint Stock Companies Acts has power to hold lands (*q*), but no company formed for the purpose of promoting art, science, religion or charity, or any other like object not involving the acquisition of gain by the company or by the individual members thereof, shall without the sanction of the board of trade, hold more than two acres of land, but the board of trade may by licence, under the hand of one of their principal or assistant secretaries, empower any such company to hold lands in such quantity, and subject to such conditions, as they think fit (*r*).

Purchases by individuals who are unincorporated must be made by them in their private capacities and individual names. A purchaser by *eo nomine* the inhabitants of a place, or the parishioners or churchwardens of a parish, is bad; so is a similar purchase by or grant to the commoners of a waste (*s*).

By the custom of London and some other places the parson and the churchwardens are a corporation to purchase land (*t*), and so by statute are churchwardens and overseers generally in some matters relating to the poor laws (*u*), and to education (*x*).

At the time of the passing of the act amending the Law

(*p*) 7 & 8 Will. 3, c. 37.

(*q*) 25 & 26 Vict. c. 89, s. 18.

(*r*) *Ib.* s. 21.

(*s*) Co. Litt. 3 a.

(*t*) *Warner's case*, Cro. Jac. 532.

(*u*) 9 Geo. 1, c. 7, s. 4; Sugd.

V. & P. 685.

(*x*) 4 & 5 Vict. c. 38, s. 8;

12 & 13 Vict. c. 49, and 14 Vict.

c. 24.

relating to Treason and Felony (*y*); presently referred to, traitors and felons could sell personal property for the maintenance of themselves or families (*z*), though a mere colourable disposition of goods by a person under a charge of felony for avoiding forfeiture would be void as against the crown (*a*); so also would be a voluntary settlement of personal estate after commission of felony in favour of a wife and children (*b*). And a conviction for treason or felony occasioned a forfeiture of personal estate though vested in trustees (*c*).

Estates of inheritance were affected, both as regarded escheat and forfeiture, from the time of commission of the offence, and consequently any alienation thereof between that period and conviction was ineffectual to defeat the rights of the crown, even though made to a purchaser for valuable consideration without notice (*d*). And where the estate was vested in trustees, and the *cestui que trust* died without heirs or committed felony, his beneficial estate would not escheat, but the trustees held it discharged from the trust (*e*). The same rule still applies in the case of a mortgagor dying without heirs, in which event the equity of redemption belongs to the mortgagee (*f*), and there was no escheat on the treason or felony of a trustee or mortgagee (*g*).

(*y*) 33 & 34 Vict. c. 23.

(*z*) 8 Co. 171.

(*a*) *Ib.*; *Perkins v. Bradley*, 1 Hare, 219.

(*b*) *Re Saunders' Estate*, 4 Giff. 179.

(*c*) *Prid. Con.*, tit. "Purchase

Deeds."

(*d*) 4 Jarm. Con. by S. 75.

(*e*) *Taylor v. Haygarth*, 14 Sim. 8; *Burgess v. Wheate*, 1 Eden, 177.

(*f*) *Beale v. Symonds*, 16 Beav. 406.

(*g*) 13 & 14 Vict. c. 60, s. 46.

SECTION 4.

Contracts by Fiduciary Vendors.

Persons acting in a fiduciary capacity, such as trustees for sale, persons selling under statutory or other powers, executors and administrators, trustees in bankruptcy and other persons acting under trusts or for the benefit of others, derive the powers and authorities exercised by them under the deed, will, or other document creating the trust or power, or by statutory enactment; and during the present reign the powers of such persons have been materially facilitated and augmented by various acts of parliament, to which reference will be hereafter made. And, first, as to trusts and powers created by deed or will.

Trusts for and powers of sale usually declare by whom they are to be exercised, the time of such exercise, and in what manner they are to be carried into execution, and how the proceeds of sale are to be disposed of.

A trust for sale and a mere power of sale unaccompanied by the legal estate differ in that the trust will be exerciseable by the person or persons in whom the legal estate may become vested; thus if vested in two trustees, their heirs or assigns, or by implication, their executors, administrators, or assigns upon trust for sale, in the event of the death of one of them the trust would be exerciseable by the surviving trustee (*h*).

(*h*) *Lane v. Debenham*, 11 Hare, 557; *Warburton v. Sandys*, 14 188; *Watson v. Pearson*, 2 Exch. Sim. 622.
Rep. 581; *Jones v. Price*, 11 Sim.

And the Conveyancing and Law of Property Act, 1881, s. 38, sub-s. 1, provides, as to trusts coming into operation after the 31st day of December, 1881, that a power or trust vested in two or more executors or trustees jointly, unless the contrary is expressed by the instrument, if any, creating it, may be exercised or performed by the survivor or survivors of them for the time being (*l*). A mere power of sale, however, must be followed strictly, and be exercised by the person or persons named by the document creating it, and cannot on the death of one, if given to several by name, be exercised by the survivors (*m*). But if the power authorizes it to be exercised by persons to whom a general description is given, as "my sons," "my sons in law," or "my trustees," and not by their proper names, in the event of death of any or either of them the authority will survive while the plural number remains. And if given to executors, by their description as such, and the will does not expressly point to a joint exercise, a single surviving executor may exercise it; though if given to them by name, it seems doubtful, unless the power arises by implication, when it will survive (*n*).

When a power is given over real or personal estate, if it reposes a personal trust and confidence in the donee to exercise his judgment and discretion, he cannot

(*l*) 44 & 45 Vict. c. 41, s. 38.

& Ald. 608; *Hall v. Dewes*, Jac.

(*m*) *Townsend v. Wilson*, 1 Barn.

189.

(*n*) Sugd. Pow. 146.

depute another to exercise it, and consequently trustees cannot sell by attorney, though the mere execution of a conveyance under power of attorney would not be a delegation of such confidence or discretion (*o*); and if a trust is directed to be exercised by the assigns of the trustee, a devisee by will, but not an assignee under a deed, can exercise it (*p*).

If one of two or more trustees disclaims, the remaining trustees or trustee will take the legal estate vested in the trustees as such, with such powers as are requisite for the administration of the trust (*q*); and in a case where a power was vested in two trustees, or the survivor of them, and one disclaimed, it was held that the sole acting trustee might execute it (*r*).

Trustees are usually directed to sell with all convenient speed, but there must necessarily be some discretion which the trustee may safely exercise. Where the trust for sale is with a view to conversion, the trustees should sell at once, and would not be justified in first mortgaging the property (*s*); though in a recent case, it was held that a simple power of sale would authorize a mortgage (*t*); but if the trust is for a re-investment in real estate, a sale should not be made for the mere purpose of converting the estate (*u*). If the document under which the trust is created fixes the

(*o*) Sugd. Pow. 214.

(*s*) Sugd. V. & P. 58.

(*p*) *Titley v. Wolstenholme*, 7 Beav. 425.

(*t*) *Devaynes v. Robinson*, 24 Beav. 86.

(*q*) *Hill's Trustees*, 205.

(*u*) Sugd. Pow. 473.

(*r*) *Eaton v. Smith*, 2 Beav. 236.

time for sale, the sale must be made accordingly, and not anticipated (*x*).

If a trust or power of sale be not exercised, and the beneficiaries thereunder acquiesce in the non-exercise after the purposes for which it was created have ceased to exist, they will be entitled to have the property in specie discharged from the trust, and the parties authorized to exercise it will become simply bare trustees of the legal estate for the beneficiaries (*y*). After the institution of proceedings for the execution of the trust, a sale cannot be made without leave of the court (*z*); but it has been held that an executor can make a good title to leaseholds, notwithstanding the existence of an administration suit, so long as the decree has not been made (*a*).

The mode of sale authorized must be followed. If a sale by auction is directed even at a sum mentioned in the instrument creating the trust, a sale by private contract at that sum must not be made, and *vice versa* (*b*); and where the sale is by auction due notice and advertisements of the sale should be made (*c*). If the trust does not direct the mode of sale, it may be made either by public auction or private contract. And

(*x*) *Gosling v. Carter*, 1 Coll. 652.

(*y*) *Lantsbury v. Collier*, 2 K. & J. 709; *Wolley v. Jenkins*, 3 Jur., N. S. 321; *Trower v. Knightley*, 6 Mad. 134; *Tate v. Swinstead*, 26 Beav. 525.

(*z*) *Walker v. Smallwood*, Amb. 676.

(*a*) *Neeves v. Burrage*, 14 Jur. 177.

(*b*) *Druce v. Adams*, Amb. 495.

(*c*) *Ord v. Noel*, 5 Mad. 438.

the Conveyancing and Law of Property Act, 1881, s. 35, provides, as to trusts or powers created by an instrument coming into operation after the commencement of the act, that "where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, and either by public auction or private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss."

A trust for sale generally provided that the receipts of the trustees for sale should be valid discharges for the purchase-money, and thus the purchaser was exonerated from having to see that the disposition thereof was in accordance with the trusts; but in cases not coming within the operation of 22 & 23 Vict. c. 35, s. 23, and 23 & 24 Vict. c. 145, s. 29, if the instrument creating the trust did not provide for such exoneration, it would have been incumbent upon a purchaser to consider whether, under the circumstances upon which the sale was made, the trustees were entitled to give a valid discharge. Sect. 29 of 23 & 24 Vict. c. 145, has now been repealed by the Conveyancing and Law of Property Act, 1881, sect. 36 of which provides, as to trusts created either before or after its commencement, that "the receipt

in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof."

If the purchase-money is to be applied upon trusts which require time and discretion (*d*), or in payment of debts, or debts and legacies (*e*), though not of legacies alone (*f*), or for the benefit of a person who may be an infant or unascertained at the time of the sale (*g*), it will not be incumbent upon a purchaser to see to the application of the purchase-money in cases not coming within the operation of the act.

Where the purchase-money is to be paid to an ascertained person, whose incapacity to receive the same is not contemplated by the person creating the trust, or to pay specific debts, or to invest in specific securities, a purchaser would be bound to see to the application of the purchase-money, or such part thereof as would be sufficient to answer the trusts (*h*).

In a case where land stood limited to such uses as D. should appoint, and subject thereto to the use of D.,

(*d*) *Doran v. Wiltshire*, 3 Sw. 699.

(*e*) *Johnson v. Kennett*, 3 M. & R. 624; *Page v. Adam*, 4 Beav. 269.

(*f*) *Wms. Real Assets*, 62.

(*g*) *Lavender v. Stanton*, 6 Mad.

46; *Sowarby v. Lacy*, 4 Mad. 142.

(*h*) *Sugd. V. & P.* 542, 543.

and the heirs of his body, a contract entered into by D., who died before conveyance, was held to operate as an execution of the power of appointment in equity, and the purchase-money was held to be payable to his personal representative as part of his personal estate (i).



SECTION 5.

*Powers conferred by Lands Clauses Consolidation Act,
1845.*

The compulsory taking of lands for undertakings of a public nature is now regulated by the Lands Clauses Consolidation Act (k), which empowers the promoters of an undertaking to agree with the owner of lands by the special act authorized to be taken, and with all persons having any interest in such lands by that or the special act enabled to sell and convey the same, for the absolute purchase thereof and of all estates and interests therein (l).

It shall be lawful for all parties seised, possessed of, or entitled to any such lands, or any estate or interest therein, to sell, convey or release the same to the promoters of the undertaking, and to enter into all necessary agreements for that purpose, and particularly it shall be lawful for all or any of the following parties so

(i) *Re Dyke's Estate*, 7 L. R.,
Eq. 337.

(k) 8 & 9 Vict. c. 18.

(l) *Ib.* s. 6.

seised, possessed or entitled as aforesaid, so to convey or release (that is to say), all corporations, tenants in tail or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees or feoffees in trust for charitable or other purposes, executors and administrators, and all parties for the time being entitled to the receipt of the rents and profits of any such lands in possession, or subject to any estate in dower, or to any lease for life or for lives and years, or for years or any less interest; and the power so to sell and convey or release as aforesaid may lawfully be exercised by all such parties other than married women entitled to dower, or lessees for life or for lives and years, or for years or for any less interest, not only on behalf of themselves and their respective heirs, executors, administrators and successors, but also for and on behalf of every person entitled in reversion, remainder or expectancy after them, or in defeasance of the estates of such parties, and as to such married women, whether they be of full age or not, as if they were sole and of full age, and as to such guardians on behalf of their wards, and as to such committees on behalf of the lunatics and idiots of whom they are the committees respectively, and that to the same extent as such wives, wards, lunatics and idiots respectively could have exercised the same power under the authority of this or the special act if they had respectively been under no disability, and as to such trustees, executors and administrators on behalf of their

cestui que trusts, whether infants, issue unborn, lunatics, *femes covert* or other persons, and that to the same extent as such *cestui que trusts* respectively could have exercised the same powers under the authorities of this and the special act as if they had respectively been under no disability (*m*).

The purchase-money or compensation to be paid for lands purchased or taken from any party under any disability or incapacity, and not having power to sell or convey such lands except under the provisions of that or the special act, is to be ascertained either by the verdict of a jury or arbitration or by valuation (*n*).

Nothing in the act or in the special act shall enable any municipal corporation to sell without the approbation of the commissioners of the treasury (*o*), and committees of lunatics should not exercise the powers conferred on them by the act without the consent of the lord chancellor (*p*).

When promoters of an undertaking require to purchase lands under the authority of the act, they are to give notice thereof in the manner prescribed by the 18th section, and such notice constitutes, as between the owner and the company, the relation of vendor and purchaser to a certain extent (*q*). But if an owner dies

(*m*) 8 & 9 Vict. c. 18, s. 7.

(*n*) *Ib.* s. 9.

(*o*) *Ib.* s. 15.

(*p*) *In re Wade*, 1 H. & Tw. 202.

(*q*) *Stone and others v. Coml.*

Rail. Co., 1 Rail. & Canal Cases, 375; *Haynes v. Haynes*, 1 Drew. & Sm. 426; *Gardner v. Charing Cross Rail. Co.*, 2 Johns. & Hem. 248; *Re Battersea Park Acts*, 32 Beav. 591.

after receiving the notice before the price is fixed, the purchase-money will go to his heir (*r*), though should the price be fixed, the relation of vendor and purchaser is fully established (*s*).

If the purchase-money or compensation payable in respect of any lands taken from any person under any of the disabilities before mentioned amount to or exceed the sum of 200*l.*, the same shall be paid into the bank in the name of the accountant-general in the manner directed by the act, and shall remain so deposited until the same shall be applied to some or one of the following purposes, viz.: the purchase or redemption of the land tax, or the discharge of any incumbrance affecting the land purchased or taken or other lands settled there-with,—in the purchase of other lands to be settled in the same manner as the lands purchased or taken, or if paid in respect of buildings taken or injured, in removing or replacing such buildings or substituting others in their stead in such manner as the Court of Chancery shall direct, or in payment to any party absolutely entitled to the money (*t*).

If such money or compensation shall not amount to 200*l.* and shall exceed 20*l.*, it shall either be paid into the bank, and applied as directed with respect to sums amounting to or exceeding 200*l.*, or the same may be paid to two trustees to be nominated in the manner

(*r*) *Battersea Park Acts*, 32 23 Beav. 575; *Metropolitan Rail. Co. v. Woodhouse*, 11 Jur. 296.

(*s*) *Regent's Canal Co. v. Ware*, (t) 8 & 9 Vict. c. 18, s. 69.

prescribed by the act, but such last-mentioned application is not to be made unless the promoters of the undertaking approve thereof and of the trustees named, and such money shall be by such trustees applied in the manner directed with respect to money paid into the bank, but it shall not be necessary to obtain any order of the court for that purpose (u).

If such money shall not exceed twenty pounds the same shall be paid to the parties entitled to the rents and profits of the lands for their own use and benefit; or in case of incapacity of such persons, the same money shall be paid for their use to their respective guardians, husbands, committees, or trustees (x).

Upon the deposit in the bank of the purchase-money or compensation, all parties by the act enabled to sell or convey lands shall, when required so to do by the promoters of the undertaking, convey the lands to them or as they shall direct, and in default thereof, or if a good title is failed to be adduced to such lands to their satisfaction, it shall be lawful for the promoters, if they think fit, to execute a deed poll under their common seal if they be a corporation, or if they be not a corporation under the hands and seals of the promoters or any two of them, containing a description of the lands in respect of which such default shall be made, and upon such deed poll being executed in the manner directed by the act all the estate and interest in such lands of or capable of being sold or conveyed by the party between

(u) 8 & 9 Vict. c. 18, s. 71.

(x) *Ib.* s. 72.

whom and the promoters such agreement shall have been come to, or as between whom and the promoters such purchase or compensation shall have been determined, shall vest absolutely in the promoters, and as against such parties and all parties on behalf of whom they are hereinbefore enabled to sell and convey, the promoters of the undertaking shall be entitled to the immediate possession of such lands (*y*).

If the owner of such lands or of any interest therein on tender of the purchase-money or compensation either agreed or awarded to be paid in respect thereof, refuse to accept the same or neglect or fail to make out a title to such lands or to the interest therein claimed by him to the satisfaction of the promoters, or if he refuse to convey such lands as directed by the promoters, or if any such owner be absent from the kingdom or cannot after diligent inquiry be found or fail to appear on the inquiry before a jury as therein provided, it shall be lawful for the promoters to deposit the purchase-money in the bank (*z*). And upon such deposit it shall be lawful for the promoters if they think fit to execute a deed poll as provided for by the 75th section of the act, which is to vest in the promoters all the estate in the lands described therein of the parties for whose use such purchase-money or compensation shall have been deposited (*a*).

In all cases of money deposited in the bank under

(*y*) 8 & 9 Vict. c. 18, s. 75.

(*z*) *Ib.* s. 76.

(*a*) *Ib.* s. 77.

that or the special act, except where such moneys have been deposited by reason of refusal of the party entitled thereto to receive the same, or to convey the lands or make out a good title, it shall be lawful for the Court of Chancery to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto, to be paid by the promoters, that is to say, the costs of the purchase or taking of the lands other than such costs as therein otherwise provided for, and the costs of the investment of such moneys in government or real securities and of the re-investment thereof in the purchase of other lands. Provided always, that the costs of one application only for re-investment in land shall be allowable, unless it shall appear to the court that it was for the benefit of the parties interested in the moneys that the same should be invested in the purchase of lands in different sums and at different times (b).

Conveyances of lands to be purchased under the provisions of that or the special act may be according to the forms in the schedules to the act, or as near thereto as the circumstances of the case will admit, or by deed in any other form which the promoters of the undertaking may think fit; and conveyances made according to the forms in the schedule, or as near thereto as the circumstances of the case will admit, shall be effectual to vest the lands thereby conveyed in the promoters of the undertaking, and shall operate to merge all terms of

(b) 8 & 9 Vict. c. 18, s. 80.

years attendant by express declaration or construction of law, and to bar all estates tail and all other estates, rights, titles, remainders, reversions, limitations, trusts and interests whatsoever in the said lands, but although terms of years be thereby merged, they shall, in equity, afford the same protection as if they had been kept on foot (c).

The costs of such conveyances shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred as well on the part of the seller as the purchaser, and the costs of deducing, evidencing and verifying the title to such lands, and of all abstracts and attested copies and other reasonable expenses incident to the investigation, deduction and verification of the title (d). It is doubtful whether, under the provisions of the act, the vendor can recover the costs of or prior to the contract, and consequently it is usual to stipulate that the promoters shall pay the costs of and incident and preliminary to the agreement for sale and purchase (e). With reference to the costs of the conveyance, it has been held in the case of a landowner dying after contract and before conveyance, leaving infant heiresses on whom the estate descended, that the company were entitled to be paid out of the purchase-money their costs of suit for procuring a declaration that the infants were trustees, and able, as such, to convey within the meaning of 11 Geo.

(c) 8 & 9 Vict. c. 18, s. 81.

(d) *Ib.* s. 82.

(e) See, however, *Ex parte Stevens*, 12 Jur. 238.

4 & 1 Will. 4, c. 60 (*f*); and the costs of a suit rendered necessary to procure a conveyance under 1 Will. 4, c. 60, have been allowed out of the purchase-money in a case where the vendor devised the land in strict settlement (*g*).

Every conveyance to the promoters of lands of copyhold or customary tenure is to be entered by the steward of the manor upon the court rolls; and upon payment of such fees as would be due to him on the surrender of the same lands to the use of a purchaser, he is to make such enrolment, and the conveyance, when so enrolled, is to have the effect in respect of such lands as if the same were of freehold tenure (*h*); and until the same are enfranchised they are to continue subject to the accustomed fines, heriots and services (*i*); and it has been held that under this provision the steward cannot claim the fee which would be payable on the admittance of a purchaser (*k*).

The act also contains provisions enabling the promoters to dispense with the concurrence of incumbancers who refuse to receive their money or release, or who cannot make a satisfactory title, and also provisions which apply to cases where a portion only of the lands subject to the incumbrance is required for the purposes of the undertaking (*l*).

(*f*) *Midland Rail. Co. v. Westcomb*, 11 Sim. 57; see, however, *Hanson v. Lake*, 2 You. & Col. 328.

(*g*) *Eastern Counties Rail. Co. v. Tuffnell and others*, 3 Rail. & Canal Cases, 133.

(*h*) 8 & 9 Vict. c. 18, s. 95.

(*i*) *Ib.* ss. 95, 96.

(*k*) *Cooper v. Norfolk Rail. Co.*, 3 Exch. 546.

(*l*) 8 & 9 Vict. c. 18, ss. 108 to 114.

The powers of the promoters for the compulsory taking of lands for the purposes of the special act are limited to the prescribed period, and, if no period is prescribed, not after the expiration of three years from the passing of the special act (*m*).

The act also contains provisions enabling the promoters, upon the discovery at any time of the existence of outstanding estates or interests, the purchase whereof may have been omitted by mistake, to purchase the same compulsorily; and prescribes the manner in which the value thereof is to be estimated, and provides for the payment of the costs of litigation with reference to such lands (*n*).

The promoters are, within the time prescribed by the special act, or, if no period be prescribed, within ten years after the expiration of the time thereby limited for the completion of the works, to sell such lands as shall not be required for the purposes of the undertaking. Such superfluous lands, unless they be situate in a town (*o*), or be lands built upon or used for building purposes, are to be first offered to the person then entitled to the lands, if any, from which the same were originally severed, or if he refuse, or for six weeks neglect to signify his wish to purchase the same or cannot be found, then to other adjoining owners; and

(*m*) 8 & 9 Vict. c. 18, s. 123.

(*n*) *Ib.* ss. 124, 125, 126.

(*o*) As to what are lands situate within a town within the meaning of this section (128), see

Elliot v. South Devon Rail. Co., 5 Rail. Ca. 500; *Lord Carrington v. Wycombe Rail. Co.*, 3 L. R., C. 377.

unless a sale be made either to such person or adjoining owners, the superfluous lands remaining unsold after such period are to vest in and become the property of the owners of the land adjoining thereto, in proportion to the extent of their lands respectively adjoining the same (*p*). But a company may contract for a sale of superfluous lands before having made the prescribed offers, and having subsequently made same and had them refused may enforce the contract (*q*).

In every conveyance by the promoters the word grant shall operate as express covenants by the promoters with the grantees therein named, that they were seised in fee, for quiet enjoyment, free from incumbrances by the promoters, and for further assurance (*r*).

SECTION 6.

Powers conferred by Trustee Act, 1850.

By the Trustee Act, 1850 (*s*), the lord chancellor is empowered to make such order as he may think fit for

- (*p*) 8 & 9 Vict. c. 18, ss. 127, 128, 129. As to what are superfluous lands within the meaning of these sections, see *Coventry v. L., B. and S. C. Rail. Co.*, 5 L. R., Eq. 104; *London and S. W. Rail. Co. v. Blackmore*, 4 L. R., H. L. 610; *Betts v. Great Eastern Rail. Co.*, 8 L. R., Ex. 294; *Great Western Rail. Co. v. May*, 7 L. R., H. L. 283.
- (*q*) *London and Greenwich Rail. Co. v. Goodchild*, 8 Jur. 455.
- (*r*) 8 & 9 Vict. c. 18, s. 132.
- (*s*) 13 & 14 Vict. c. 60.

vesting and releasing lands held upon trust, or by way of mortgage, in the following cases.

A lunatic or person of unsound mind, or infant, being seised or possessed of lands upon any trust or by way of mortgage (*t*), or entitled to any contingent right in such lands (*u*).

Of a person solely or jointly with any other person or persons seised or possessed of any lands upon trust, or entitled to a contingent right in any lands, being out of the jurisdiction or not to be found (*x*).

Where two or more persons may have been jointly seised or possessed of lands upon any trust, and it shall be uncertain which of them was the survivor (*y*).

Where any one or more person or persons shall have been seised or possessed of lands upon any trust, and it shall not be known whether the trustee last known to have been seised or possessed be living or dead (*z*).

Where a person seised of lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee (*a*).

Where lands are subject to a contingent right in an unborn person, or class of persons, who upon coming

- | | |
|---|------------------------------------|
| (<i>t</i>) 13 & 14 Vict. c. 60, ss. 3, 7. | bare trustee within the meaning |
| (<i>u</i>) <i>Ib.</i> ss. 4, 8. | of the Vendor and Purchaser |
| (<i>x</i>) <i>Ib.</i> ss. 9, 10, 11, 12. | Act, 1874, s. 5, such lands will |
| (<i>y</i>) <i>Ib.</i> s. 13. | vest like a chattel real in the |
| (<i>z</i>) <i>Ib.</i> s. 14. | legal personal representative from |
| (<i>a</i>) <i>Ib.</i> s. 15. If such a person | time to time of such trustee. |
| come within the definition of a | |

into existence would in respect thereof have become seised or possessed of such lands upon any trust (b).

Where a person jointly or solely seised or possessed of lands or a contingent right in lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands or a duly authorized agent, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for twenty-eight days next after a proper deed for conveying the same shall have been tendered to him by any person entitled to require the same or by such agent (c).

And where a mortgagee shall have died without having entered into possession or receipt of the rents and profits of mortgaged lands, and the mortgage money shall have been paid to a person entitled to receive the same, or such person shall consent to an order for the reconveyance of such lands, the court may make an order vesting the lands in such manner and for such estate as the court may direct in the following cases:

Where the heir or devisee of the mortgagee shall be out of the jurisdiction or cannot be found.

Where the heir or devisee of the mortgagee, upon demand by a person entitled to require a conveyance of such lands or his agent, shall have stated in writing that

(b) 13 & 14 Vict. c. 60, s. 16.

2 of the Trustee Extension Act,

(c) *Ib.* ss. 17, 18. These sections have been repealed by sect.

15 & 16 Vict. c. 55.

he will not convey the same or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying the same shall have been tendered to him by a person entitled as aforesaid or his agent.

Where it shall be uncertain which of several devisees of such mortgagee was the survivor.

Where it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead.

Where such mortgagee shall have died intestate as to such lands and without an heir, or shall have died without its being known who is his heir or devisee.

Which order so to be made by the court is to have the effect of an assurance (*d*).

The court may in every case, instead of making a vesting or releasing order, appoint a person to make a conveyance, assignment, release, or disposition of the lands or contingent interest, which, when duly made, is to have the effect of a vesting or releasing order (*e*).

As respects copyhold or customary lands a vesting order, if made with the consent of the lord of the manor, will pass the lands without surrender or admittance; and where a person is appointed by the court to convey the lands, such person may do all acts and execute all instruments for the purpose of completing the assurance (*f*).

(*d*) 13 & 14 Vict. c. 60, s. 19.

(*f*) *Ib.* s. 28.

(*e*) *Ib.* s. 20.

Where a decree shall be made for the specific performance of a contract relating to land, or for the partition or exchange of any lands, the court may declare that any of the parties to the suit are trustees of the lands within the meaning of the act, and may declare concerning the interests of unborn persons who may claim under any party to such suit, or under the will or voluntary settlement of a person deceased, who was during his lifetime a party to the contract or transaction concerning which such decree is made, that such interests of unborn persons are the interests of persons who upon coming into existence would be trustees within the meaning of the act; and thereupon the estates, rights and interests of such persons born or unborn may be dealt with by order under the act (*g*).



SECTION 7.

Trustee Extension Act.

By the Trustee Extension Act (*h*) the lord chancellor is empowered to make such an order when any person shall be jointly or solely seised or possessed of any lands, or entitled to any contingent right or interest therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly autho-

(*g*) 13 & 14 Vict. c. 60, s. 30.

(*h*) 15 & 16 Vict. c. 55.

rized agent of such last-mentioned person, requiring such trustee to convey or assign the same or to release such contingent right (i).

SECTION 8.

Powers conferred by Settled Estates Act, 1877.

During the present reign several acts (k) were passed with a view to facilitating the granting of leases and effecting sales of settled estates which have recently been consolidated and amended by the Settled Estates Act, 1877 (l), which repeals all former acts upon the subject so far as such repeal does not affect anything done or any proceeding taken under any enactment repealed (m), and which last-mentioned act came into operation on the 1st November, 1877, after providing that the word "settlement" as used in the act shall signify any act of parliament, deed, agreement, copy of court roll, will, or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such

(i) 15 & 16 Vict. c. 55, s. 2.

Vict. c. 30.

(k) 19 & 20 Vict. c. 120; 21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33; 39 & 40

(l) 40 & 41 Vict. c. 18.

(m) *Ib.* s. 58.

instruments affecting the estates of any one or more of such persons exclusively :

The term "settled estates" as used in the act shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement; and for the purposes of the act a tenant-in-tail after possibility of issue extinct shall be deemed to be a tenant for life :

All estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement :

In determining what are settled estates within the meaning of the act, the court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the settlement taking effect⁽ⁿ⁾.

The expression "the court" in the act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under the act shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of the High Court of Justice in like manner as if such causes and matters had arisen under an act of parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to

(n) 40 & 41 Vict. c. 18, s. 2.

the Court of Chancery, or to any judges or judge thereof respectively :

The expression "the court" in the act shall, so far as relates to estates in Ireland, mean the Court of Chancery in Ireland (o) :

It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the act contained, from time to time to authorize a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for the time being is or shall be required in the sale of lands sold under a decree of the court (p).

When any land is sold for building purposes, it shall be lawful for the court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the court shall approve.

On any sale of land any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the court may deem advisable (q).

(o) 40 & 41 Vict. c. 18, s. 3.

(p) *Ib.* s. 16.

(q) 40 & 41 Vict. c. 18, ss. 18,

19. Section 17 of the Settled

It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in the act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or water-courses, either to be dedicated to the public or not; and the court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the court shall be deemed advisable (*r*).

Where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or water-courses, including all necessary or proper fences, pavings, connexions, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof, or

Estates Act, 1877, was repealed Act, 1882.

by sect. 64 of the Settled Land (*r*) 40 & 41 Vict. c. 18, s. 20.

out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income; and the court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the court shall seem advisable (s).

On every sale or dedication to be effected as hereinbefore mentioned, the court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct (t).

Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person

(s) 40 & 41 Vict. c. 18, s. 21.

(t) *Ib.* s. 22.

who, but for such assignment, would be entitled to such estates for a term of years determinable with any life, or for an estate for any life or any greater estate, may apply to the court by petition in a summary way to exercise the powers conferred by the act (*u*).

Subject to the exceptions in the act contained, every application to the court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one such tenant-in-tail, then the first of such tenants-in-tail, and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf ^{of} any unborn child prior to the estate of such tenant-in-tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child (*x*).

Provided always, that where an infant is tenant-in-tail under the settlement, it shall be lawful for the court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the

(*u*) 40 & 41 Vict. c. 18, s. 23.

(*x*) *Ib.* s. 24.

persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant (*y*).

All money to be received on any sale effected under the authority of the act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, so far as relates to estates in England, shall be paid into court *ex parte* the applicant in the matter of the act, and so far as relates to estates in Ireland shall be paid into the Bank of Ireland to the account of the Accountant-General *ex parte* the applicant in the matter of the act; and such money shall be applied as the court shall from time to time direct to some one or more of the following purposes, namely,—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland the purchase or redemption of rentcharge in lieu of tithes, crown rent, or quit rent;

The discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in

the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled.

The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without any application to the court, or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land (s).

The court shall be at liberty to exercise any of the powers conferred on it by the act, whether the court shall have already exercised any of the powers conferred by the act in respect of the same property or not; but no such powers shall be exercised if "an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the court from exercising any of the powers conferred by the act, if it shall think that the powers contained in the settlement ought to be extended (a).

Nothing in the act shall be construed to empower the court to authorize any lease, sale, or other act beyond the extent to which in the opinion of the court

(s) 40 & 41 Vict. c. 18, ss. 34, 35.

(a) *Ib.* s. 38.

the same might have been authorized in and by the settlement by the settlor or settlors (*b*).

After the completion of any lease or sale or other act under the authority of the court, and purporting to be in pursuance of the act, the same shall not be invalidated on the ground that the court was not thereby empowered to authorize the same, except that no such lease, sale, or other act shall have any effect against such person as therein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with (*c*).

It shall and may be lawful for any person who under the provisions of the act may make an application to the Court of Chancery in Ireland for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland, for the purpose of having the lease or sale of such settled estate under the said last-mentioned court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court of Chancery in Ireland in relation to leases or sales of such nature under the provisions of the act, save that the judge in the case of a sale shall himself execute the

(*b*) 40 & 41 Vict. c. 18, s. 39.

(*c*) *Id.* s. 40.

conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the act of the twenty-first and twenty-second years of her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be subject to appeal to the Court of Appeal in Chancery as in other cases under the said act (*d*).

Where a married woman shall apply to the court, or consent to an application to the court, under the act, she shall first be examined apart from her husband touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement restraining anticipation

(*d*) 40 & 41 Vict. c. 18, s. 45.

shall prevent the court from exercising, if it shall think fit, any of the powers given by the act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding (e).

Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants (f).

Nothing in the act shall be construed to create any obligation on any person to make or consent to any application to the court or to exercise any power (g).

For the purposes of the act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein (h).

(e) 40 & 41 Vict. c. 18, s. 50.

(f) *Ib.* s. 52.

(g) 40 & 41 Vict. c. 18, s. 53.

(h) *Ib.* s. 54.

SECTION 9.

Powers conferred by the Settled Land Act, 1882.

The Settled Land Act, 1882 (45 & 46 Vict. c. 38), which came into operation on the 1st of January, 1883, is divided into seventeen parts.

Part II. contains the several definitions given by the act, which are as follows:—

“2.—(1) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this act a settlement, and is in this act referred to as a settlement, or as the settlement, as the case requires.

“ (2) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement.

“ (3) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this act

settled land, and is, in relation to the settlement, referred to in this act as the settled land.

“(4) The determination of the question whether land is settled land, for purposes of this act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect.

“(5) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this act the tenant for life of that land, and the tenant for life under that settlement.

“(6) If, in any case, there are two or more persons so entitled as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this act.

“(7) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent.

“(8) The persons, if any, who are for the time being, under a settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act, are for purposes of this act trustees of the settlement.

“(9) Capital money arising under this act, and receivable for the trusts and purposes of the settlement, is in this act referred to as capital money arising under this act.

“(10) In this act—

“(i) Land includes incorporeal hereditaments, also an undivided share in land; income includes rents and profits; and possession includes receipt of income:

“(ii) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift:

“(iii) Building purposes includes the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for any building purposes or purposes connected therewith:

“(iv) Mines and minerals mean mines and minerals, whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works,

suitable for those purposes ; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes :

“(v) Manor includes lordship, and reputed manor or lordship :

“(vi) Steward includes deputy steward, or other proper officer, of a manor :

“(vii) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will :

“(viii) Securities includes stocks, funds, and shares :

“(ix) Her Majesty’s High Court of Justice is referred to as the court :

“(x) The Land Commissioners for England as constituted by this Act are referred to as the Land Commissioners :

“(xi) Person includes corporation.”

Part III. relates to sale, enfranchisement, exchange, partition, and contains the following general powers and regulations :—

“3. A tenant for life—

“(i) May sell the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same; and

“(ii) Where the settlement comprises a manor,—may sell the seignory of any freehold land within the manor, or the freehold and inheritance of any copyhold or customary land, parcel of the manor, with or without any ex-

ception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to effect an enfranchisement; and

“(iii) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and

“(iv) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.”

“4.—(1) Every sale shall be made at the best price that can reasonably be obtained.

“(2) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

“(3) A sale may be made in one lot or in several lots, and either by auction or by private contract.

“(4) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

“(5) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

“(6) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with

respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

“(7) An enfranchisement may be made with or without a re-grant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

“(8) Settled land in England shall not be given in exchange for land out of England.”

Part IV., being sects. 6 to 14 inclusive, relates to leases.

Part V. relates to sales, leases, and other dispositions, and is as follows:—

“15. Notwithstanding anything in this act, the principal mansion house on any settled land, and the demesnes thereof, and other lands usually occupied therewith, shall not be sold or leased by the tenant for life, without the consent of the trustees of the settlement, or an order of the court.

“16. On or in connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, or on any part thereof,—

“(i) May cause or require any parts of the settled

land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connection therewith; and

“(ii) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

“(iii) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the central office of the Supreme Court of Judicature), and thereby declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

“17.—(1) A sale, exchange, partition, or mining lease, may be made either of land, with or without an

exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

“(2) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

“18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this act.

“19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided share may join or concur, in any manner and to any extent necessary or proper for any purpose of this act, with any person entitled to or having power or right of disposition of or over another undivided share.

“20.—(1) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land

sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage or charge.

“(2) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this act, is effectual to pass the land conveyed, or the easements, rights or privileges created, discharged from all the limitations, powers and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder, but subject to and with the exception of—

“(i) All estates, interests and charges having priority to the settlement; and

“(ii) All such other (if any) estates, interests and charges as have been conveyed or created for securing money actually raised at the date of the deed; and

“(iii) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predeces-

sors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

“(3) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required on production to him of the deed to make the proper entry ; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly ; but if the steward so requires, there shall also be produced to him so much of the settlement as may be necessary to show the title of the person executing the deed ; and the same may, if the steward thinks fit, be also entered on the court rolls.”

Part VI. (sects. 21 to 24 inclusive) relates to investment or other application of capital trust money.

Part VII. (sects. 25 to 30 inclusive) relates to improvements with capital trust money.

Part VIII. relates to contracts, the provisions of which are as follows :—

“**31.**—(1) A tenant for life—

“(i) May contract to make any sale, exchange, partition, mortgage, or charge ; and

“(ii) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the

settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this act; and any such consideration, if paid in money, shall be capital money arising under this act; and

“(iii) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this act; and

“(iv) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and

“(v) May enter into a contract for or relating to the execution of any improvement authorized by this act, and may vary or rescind the same; and

“(vi) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this act, and may vary or rescind the same.

“(2) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against and by every successor in title for the time being of the tenant for life, and may be

carried into effect by any such successor; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

“(3) The court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

“(4) Any preliminary contract under this act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.”

Part IX. (sects. 32 to 37 inclusive) contains various miscellaneous provisions; sect. 37, subs. 1, of which is as follows:—

“**37.**—(1) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold of inheritance in the land, a tenant for life of the land may sell the chattels or any of them.”

Part X. relates to trustees. Sects. 38, 39, 40, and 45 are as follows:—

“**38.**—(1) If at any time there are no trustees of a settlement within the definition in this act, or where in any other case it is expedient, for purposes of this act, that new trustees of a settlement be appointed, the

court may, if it thinks fit, on the application of the tenant for life, or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for purposes of this act.

“(2) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this act become and be the trustees or trustee of the settlement.”

“39.—(1) Notwithstanding anything in this act, capital money arising under this act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

“(2) Subject thereto, the provisions of this act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.”

“40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as

the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this act, or that no more than is wanted is raised."

"45.—(1) A tenant for life, when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

"(2) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

"(3) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section."

Part XI. relates to Court, Land Commissioners and Procedure. Sects. 48, sub-ss. 1 and 2, and sect. 49, are as follows :—

“**48.**—(1) The commissioners now bearing the three several styles of the Inclosure Commissioners for England and Wales, and the Copyhold Commissioners, and the Tithe Commissioners for England and Wales, shall, by virtue of this act, become and shall be styled the Land Commissioners for England.

“(2) The Land Commissioners shall cause one seal to be made with their style as given by this act; and in the execution and discharge of any power or duty under any act relating to the three several bodies of commissioners aforesaid, they shall adopt and use the seal and style of the Land Commissioners for England, and no other.”

“**49.**—(1) Every certificate and report approved and made by the Land Commissioners under this act shall be filed in their office.

“(2) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.”

Part XII. (sects. 50 to 57 inclusive) relates to restrictions, savings, and general provisions, and is as follows :—

“**50.**—(1) The powers under this act of a tenant for life are not capable of assignment or release, and do not

pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

“(2) A contract by a tenant for life not to exercise any of his powers under this act is void.

“(3) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this act.

“(4) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment.”

“51.—(1) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this act a provision is inserted purporting or attempting, by way of

direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void.

“(2) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.”

“52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this act shall not occasion a forfeiture.”

“53. A tenant for life shall, in exercising any power under this act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the

position and to have the duties and liabilities of a trustee for those parties."

"54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this act."

"55.—(1) Powers and authorities conferred by this Act on a tenant for life or trustees or the Court or the Land Commissioners are exerciseable from time to time.

"(2) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

"(3) Where any provision in this act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this act."

“56.—(1) Nothing in this act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this act are cumulative.

“(2) But, in case of conflict between the provisions of a settlement and the provisions of this act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this act, the provisions of this act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this act.

“(3) If a question arises, or a doubt is entertained, respecting any matter within this section, the court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.”

“57.—(1) Nothing in this act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this act.

“(2) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in

this act, operate and be exerciseable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this act, unless a contrary intention is expressed in the settlement."

Part XIII. relates to limited owners generally, and is as follows:—

"58.—(1) Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this act, as if each of them were a tenant for life as defined in this act (namely):

- "(i) A tenant in tail, including a tenant in tail who is by act of parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by parliament in consideration of public services:
- "(ii) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:
- "(iii) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this act shall bind the Crown:

“(iv) A tenant for years determinable on life, not holding merely under a lease at a rent :

“(v) A tenant for the life of another, not holding merely under a lease at a rent :

“(vi) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose :

“(vii) A tenant in tail after possibility of issue extinct :

“(viii) A tenant by the curtesy :

“(ix) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event.

“(2) In every such case, the provisions of this act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

“(3) In any such case any reference in this act to

death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid."

Part XIV. (sects. 59 to 62 inclusive) relates to infants, married women, lunatics, and is as follows:—

"**59.** Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this act the land is settled land, and the infant shall be deemed tenant for life thereof."

"**60.** Where a tenant for life, or a person having the powers of a tenant for life under this act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this act, the powers of a tenant for life under this act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders."

"**61.**—(1) The foregoing provisions of this act do not apply in the case of a married woman.

"(2) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this act.

“(3) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this act.

“(4) The provisions of this act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

“(5) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

“(6) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this act.”

“**62.** Where a tenant for life, or a person having the powers of a tenant for life under this act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen’s Sign Manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate.”

Part XV. (sect. 63) relates to settlement by way of trusts for sale, and is as follows:—

“**63.**—(1) Any land, or any estate or interest in land,

which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, act of parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time

being, who are by the settlement declared to be trustees thereof for purposes of this act are for purposes of this act trustees of the settlement.

“(2) In every such case the provisions of this act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say) :

“(i) Any reference in this act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require) :

“(ii) Capital money arising under this act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this act, be applied in any mode in which capital money arising under the settlement from any such sale or other dis-

position is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement :

“(iii) Capital money arising under this act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission, or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly :

“(iv) Land of whatever tenure acquired under this act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the

same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging."

Part XVI. (sect. 64) relates to repeals.

Part XVII. (sect. 65) relates to Ireland, and is as follows:—

"65.—(1) In the application of this act to Ireland the foregoing provisions shall be modified as in this section provided.

"(2) The court shall be Her Majesty's High Court of Justice in Ireland.

"(3) All matters within the jurisdiction of that court shall, subject to the acts regulating that court, be assigned to the Chancery division of that court; but general rules under this act for Ireland may direct that those matters or any of them be assigned to the land judges of that division.

"(4) Any deed inrolled under this act shall be inrolled in the record and writ office of that division.

"(5) General rules for purposes of this act for Ireland shall be deemed rules of court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this act, to take effect on or after the commencement of this act.

"(6) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this act, have and exercise the power and authority exerciseable by the court under this act, in

all proceedings where the property, the subject of the proceedings, does not exceed in capital value 500*l.*, or in annual value 30*l.*

“(7) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those courts under this act.

“(8) Rules and orders for purposes of this act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this act, to take effect on or after the commencement of this act, in manner prescribed by sect. 79 of the County Officers and Courts (Ireland) Act, 1877.

“(9) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

“(10) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.”

SECTION 10.

Powers conferred by the Trustee Act, 1859.

By the Act to further amend the Law of Property and relieve Trustees (*i*), which came into operation on the 13th August, 1859, it is enacted, that where by any will which shall come into operation after the passing

(*i*) 22 & 23 Vict. c. 35.

of the act the testator shall have charged his real estate, or any specific portion thereof, with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest, and fix such period or periods of repayment, as the person or persons executing the same shall think proper (*k*).

The powers conferred by the last section are to extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any power in the will or by the Court of Chancery to succeed to the trusteeship vested in such devisee or devisees as aforesaid (*l*).

If any testator who shall have created such a charge as is described in the 14th section shall not have devised the hereditaments charged as aforesaid in such terms as

(*k*) 22 & 23 Vict. c. 35, s. 14.

*l*b. s. 15.

that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any) shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested, but any sale or mortgage under the act shall operate only on the estate and interest whether legal or equitable of the testator, and shall not render it unnecessary to get in any outstanding legal estate (*m*).

Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sects. 14, 15 and 16 of the act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof (*n*).

The provisions contained in sects. 14, 15 and 16 shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made under or in pursuance of any will coming into operation before the passing of the act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if the act had not been passed, and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor

(*m*) 22 & 23 Vict. c. 35, s. 16.

(*n*) *Ib.* s. 17.

shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do (o).

The *bonâ fide* payment to, and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security (p).

SECTION 11.

Powers conferred on Ecclesiastical Corporations.

The acts of 21 & 22 Vict. c. 57, and 24 & 25 Vict. c. 105, confer powers on ecclesiastical corporations, with the approval of the ecclesiastical commissioners, upon obtaining the consents required by the act to sell, exchange, partition, and enfranchise in manner authorized by the acts.

SECTION 12.

Powers conferred by Lord Cranworth's Act.

Lord Cranworth's Act (q), which was passed on the 28th August, 1860, recites, that it was expedient that

(o) *Id.* s. 18.

(q) 23 & 24 Vict. c. 145.

(p) *Id.* s. 23.

certain powers and provisions which it was then usual to insert in settlements, mortgages, wills and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting same in terms in every such instrument.

The first part of the act, which has been repealed by the Settled Land Act, 1882 (*r*), as from the 31st December, 1882, relates to trustees for sale and trustees of renewable leaseholds, and enacts that, where by will, deed or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale over any hereditaments, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to sell either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid, for any hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange (*s*).

It shall be lawful for the person making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title or otherwise, in any conditions of sale or contract for sale,

(*r*) 45 & 46 Vict. c. 38.

(*s*) 23 & 24 Vict. c. 145, s. 1.

or exchange as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell without being responsible for any loss which may be occasioned thereby; and no purchaser under any such sale shall be bound to inquire whether the person making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise (t), and for the purpose of completing any such sale or exchange the persons empowered to sell or exchange shall have power to convey or dispose of the hereditaments in question either by way of revocation and appointment of the use or otherwise (u).

The money so received upon any such sale, or for equality of exchange as aforesaid, shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments of freehold, leasehold, copyhold or customary tenure in manner as in the act particularly mentioned; provided that no leasehold tenement should be purchased under the powers thereinbefore contained which is held for a less period than sixty years (x).

(t) *Ib.* s. 2.(x) *Ib.* s. 4.(u) *Ib.* s. 3.

Provided that it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received upon any sale or for equality of exchange as aforesaid or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject (y)..

No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, nor shall lands in England or Wales be exchanged for others situate elsewhere; and the same rule applies to lands and hereditaments sold or exchanged in Ireland (z).

It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time either under covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of the trustees if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments; but it is provided that the power is not to extend to any case where the person in possession for his life or other

(y) 23 & 24 Vict. c. 145, s. 5.

(z) *Ib.* s. 6.

limited interest is entitled to enjoy the same without any obligation to renew or contribute to the expense of renewal (a). And the act provides for the raising of the money for equality of exchange or renewal of leases by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the last-named hereditaments shall be subject (b).

No sale, exchange or purchase is to be made without the consent of the person appointed to consent by the will, deed or other instrument, or if no such person be appointed, without the consent of the tenant for life, if there be such a person under no disability, except in cases where it appears from the will, deed or other instrument to have been intended that such sale, exchange or purchase should be made by the person or persons making the same without the consent of any other person (c).

The second part of the act relates to mortgages, and has been repealed by the Conveyancing and Law of Property Act, 1881, sect. 71, as from the 31st December in that year; but as such repeal does not affect the validity or invalidity of instruments executed or any thing done before the commencement of the repealing act, the provisions of Lord Cranworth's Act relating to mortgages are retained, and the provisions of such re-

(a) *Ib.* s. 8.

(c) *Ib.* s. 10.

(b) *Ib.* s. 9.

peeling act substituted will be found in their proper place, and provides that where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall be payable, his executors, administrators and assigns, shall at any time after the expiration of one year from the time when such principal money shall have become payable according to the terms of the deed, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the persons entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, viz.,—A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and resell the property from time to time, in like manner; a power to insure as therein mentioned, and also to appoint a receiver of the rents (*d*).

Receipts for purchase-money given by persons exercising the power of sale conferred by the act shall be sufficient discharges to purchasers, who shall not be bound to see to the application of such purchase-money (*e*).

(*d*) 23 & 24 Vict. c. 145, s. 11.

(*e*) *Id.* s. 12.

No sale as aforesaid shall be made until after six months' notice in writing shall have been given to the person or one of the persons entitled to the property, or affixed on some conspicuous part thereof, but the act relieves a purchaser against the unauthorized exercise of the power (*f*).

The person exercising the power of sale conferred by the act shall have power by deed to convey or assign to and vest in the purchaser the property sold for all the estate and interest therein which the person who created the charge had power to dispose of, except that in the case of copyholds the beneficial interest only shall be conveyed to and vested in the purchaser by such deed (*g*).

The above section is to some extent augmented by the Vendor and Purchaser Act, 1874 (*h*), which provides that the legal personal representative of a mortgagee of a freehold estate, or of a copyhold estate, to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption, or an assurance upon trust (*i*).

It will be observed that with respect to copyholds the mortgagee must have been admitted, a case not very frequently met with in practice, as the mortgagor usually surrenders the copyholds to the use of the mortgagee,

(*f*) *Ib.* s. 13.

(*g*) *Ib.* s. 15.

(*h*) 37 & 38 Vict. c. 78.

(*i*) *Ib.* s. 4.

under which surrender the mortgagee does not generally procure admittance, and when the mortgage is paid off an acknowledgment of satisfaction is entered on the court rolls, and is treated in practice as vacating that surrender.

At any time after the power of sale under Lord Cranworth's Act shall have become exercisable, the person entitled to exercise the same shall be entitled to all the deeds and documents in the possession or power of the person entitled to the property subject to the charge; and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made (*k*).

The receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof (*l*).

The act does not apply to cases where the powers thereby conferred are negatived by express declara-

(*k*) 23 & 24 Vict. c. 145, s. 16. (*l*) *Ib.* s. 29.

tion (*m*), and extends only to persons entitled or acting under a deed, will, codicil, or other instrument executed after the passing of the act, or under a will or codicil confirmed or revived by a codicil executed after that date (*n*).

It may be mentioned that the power of sale conferred on mortgagees by Lord Cranworth's Act was seldom relied upon in practice, as its provisions were not so beneficial to a mortgagee as those to be found in well-framed mortgage deeds, and occasionally the operation of the act is negatived by express declaration.



SECTION 13.

Powers conferred by Act to confirm certain Sales by Trustees.

By the act to confirm certain sales, &c. by trustees and others (*o*), it has been provided that no sale, exchange, partition or enfranchisement at any time theretofore of land by any trustees or other person made in exercise of any trust or power authorizing the sale, exchange, partition or enfranchisement, and not forbidding the reservation of minerals, and which sale, &c. shall have been made with an exception of minerals and with or without rights or powers for or incidental to the working and carrying away such minerals, shall be invalid

(*m*) *Ib.* s. 32.

(*o*) 25 & 26 Vict. c. 108.

(*n*) *Ib.* s. 34.

on the ground that the trust or power did not authorize such exception or reservation; but such sale, &c. shall be deemed to have taken effect as if the exception or reservation had been authorized by the trust or power, and no sale, &c. theretofore made of any minerals separately from the residue of the lands subject to the trust or power, and either with or without such rights or powers as aforesaid, shall be invalid on the ground that the trust or power did not authorize such sale, &c.; but such sale, &c. shall be deemed to have taken effect as if such minerals, rights and powers (if any) had been authorized to be so dealt with separately from the residue of the land, but the enactment is not to confirm any sale, &c. already declared invalid (*p*).

Every trustee now or hereafter to become authorized to dispose of land by way of sale, &c. (unless forbidden by the instrument creating the trust or power) shall be entitled to dispose of such land with the exception or reservation of any minerals and with or without such rights and powers as aforesaid, or of the minerals with or without such rights or powers separately from the residue of the land, yet so that no such disposition shall be made without the sanction of the Court of Chancery to be obtained on a petition in a summary way of the trustee or other person authorized as aforesaid, and a sanction once obtained is to be sufficient for the purpose of any future disposition under the act, without the necessity of any further application to the court (*q*).

(*p*) 25 & 26 Vict. c. 108, s. 1. (*q*) *Ib.* s. 2.

SECTION 14.

Powers conferred by the Bankruptcy Acts.

Under the act of 6 Geo. 4, c. 16, which repealed all the acts then in force relating to bankruptcy, the real and personal property of a bankrupt was taken possession of by commissioners appointed by the lord chancellor (*r*), which commissioners, upon creditors' assignees being appointed, transferred the property of the bankrupt to them, and such assignees had no title to the bankrupt's property, real or personal, until an assignment and conveyance thereof had been made to them. The conveyance was made by a common law bargain and sale, indented and inrolled in one of the King's courts of record. As to the personal property of the bankrupt the title of the assignees related back to the act of bankruptcy, but as to real property, although the assignees might claim and recover all lands of which the bankrupt was seised at the time of the act of bankruptcy or afterwards, yet the legal estate remained in the bankrupt until actually conveyed to the assignees by bargain and sale (*s*). The law was afterwards altered by the 1 & 2 Will. 4, c. 56, under which the real and personal property of the bankrupt became vested in the assignees by virtue of their appointment

(*r*) 6 Geo. 4, c. 16, s. 12.

446; *Lloyd v. Sanders*, 5 Madd.

(*s*) *Ib.* ss. 63, 64; *Doe d. Es-*

282.

daile v. Mitchell, 2 Mau. & Sel.

to the same extent as if it had been conveyed and assigned (*t*).

The law of bankruptcy was consolidated by the Bankruptcy Act of 1849 (*u*), under which all the real and personal property of the bankrupt, except copyholds, became vested in the assignees by virtue of their appointment (*x*), and all powers vested in the bankrupt, which he might have legally executed for his own benefit (except the right of nomination to a vacant ecclesiastical benefice), might be executed by the assignees for the benefit of the creditors in like manner as the bankrupt might have executed the same (*y*). And the assignees were empowered to redeem real or personal estate of the bankrupt granted by him, subject to a power of redemption, as fully as the bankrupt might have done (*z*).

The act also declared that all payments, conveyances and contracts *bond fide* made, executed and entered into by the bankrupt, and executions against his lands executed by seizure before date of the fiat or filing of the petition, should be valid notwithstanding a prior act of bankruptcy, provided the purchaser had no notice thereof (*a*); and no purchaser from a bankrupt *bond fide* and for valuable consideration, where the purchaser had notice at the time of such purchase of an act of

(*t*) 1 & 2 Will. 4, c. 56, ss. 25,
26.

(*u*) 12 & 13 Vict. c. 106.

(*x*) *Ib.* ss. 141, 142.

(*y*) *Ib.* s. 147.

(*z*) *Ib.* s. 149.

(*a*) *Ib.* s. 133.

bankruptcy, could be impeached by reason thereof, unless a fiat or petition for adjudication should have been sued out or filed within twelve months after such act of bankruptcy (*b*).

Where a conveyance of the property of a bankrupt would require to be enrolled, recorded or registered, the certificate of appointment of the assignees required to be registered, and the title of any purchaser for value without notice of the bankruptcy who should have registered his purchase deed previous to the registry, would not be invalidated by the appointment of assignees or the vesting the estate in them, unless the certificate of appointment was registered within two months from the date of the appointment (*c*).

The court was empowered to sell and, by deed enrolled on the court rolls of the manor, to convey the copyhold and customaryhold lands of the bankrupt, and to authorize any person on behalf of the Court of Bankruptcy to surrender the same for the purposes of any purchaser being admitted thereto (*d*), and provided for the purchaser compounding with the lord of the manor for the fines, dues and other services which had been usually paid, and directed that the lord should admit the vendee tenant thereof (*e*). The court was empowered to order the bankrupt to join in the conveyance, and if he did not execute the conveyance within the time appointed by the order he was stopped from objecting to

(*b*) *Ib.* s. 134.

(*c*) *Ib.* s. 143.

(*d*) *Ib.* s. 209.

(*e*) *Ib.* s. 210.

the validity thereof, and all his interest in the estate was as effectually barred by such order as if the conveyance had been executed by him (*f*).

The estates of persons not within the laws relating to bankruptcy were, in the event of such persons being unable to pay their debts, amenable to the laws regulating the proceedings of the court for relief of insolvent debtors (*g*), by virtue of which, in cases of insolvency, the court made an order vesting the property of the insolvent in a provisional assignee; and when permanent assignees were appointed pursuant to the terms of the act, upon their signifying to the court their acceptance of the appointment, the estate, effects and powers of the insolvent, which had previously vested in the provisional assignee, vested in the permanent assignees by virtue of their appointment, without any conveyance or assignment (*h*).

"The Bankruptcy Act, 1861" (*i*), extended to non-traders, and abolished the jurisdiction of the insolvent debtors' court (*k*), and which act, it was declared, was to be read with the Bankruptcy Act of 1849, except so far as the former act was repealed by the latter (*l*); and by the latter act it was provided, that on the appointment of a creditors' assignee all the real and personal estate of the bankrupt should be divested out of the official

(*f*) 12 & 13 Vict. c. 106, s. 148.

(*g*) 1 & 2 Vict. c. 110, amended
by 2 & 3 Vict. c. 39; 10 & 11
Vict. c. 102.

(*h*) 1 & 2 Vict. c. 110, s. 45.

(*i*) 24 & 25 Vict. c. 134.

(*k*) *Ib.* ss. 19 to 24.

(*l*) *Ib.* s. 232.

assignee and vested in the creditors' assignees (*m*). With reference to the copyholds of the bankrupt, sect. 209 (but not sect. 210) of the act of 1849 was repealed, and the court was empowered to make vesting orders of such copyholds (*n*).

The Bankruptcy Act, 1861, has been repealed (*o*) as from the 1st of January, 1870, and the law of bankruptcy from this date is regulated by the Bankruptcy Act, 1869 (*p*), which provides for the appointment of a trustee of the property of a bankrupt and a committee of inspection to superintend the administration of the bankrupt's estate by the trustee (*q*).

The property of the bankrupt divisible amongst his creditors shall comprise all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve upon him during its continuance; and the capacity to exercise and to take proceedings for exercising such powers as the bankrupt might have exercised for his own benefit at the commencement of his bankruptcy or during its continuance, except the right of nomination to a vacant ecclesiastical benefice, shall be vested in the trustee (*r*).

Until a trustee is appointed the registrar shall be the trustee for the purposes of the act, and immediately upon the order of adjudication being made the property

(*m*) *Ib.* s. 117.

(*n*) *Ib.* s. 114.

(*o*) 32 & 33 Vict. c. 83.

(*p*) 32 & 33 Vict. c. 71.

(*q*) *Ib.* s. 14.

(*r*) *Ib.* s. 15.

of the bankrupt shall vest in the registrar. On the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed (s); and immediately upon the appointment of a trustee being reported, the court shall give to the trustee a certificate declaring him to be the trustee, provided he may have given such security (if any) as may have been required by the creditors (t).

Where any portion of the estate of the bankrupt consists of copyhold or customary property, or any like property passing by surrender and admittance, or in any similar manner, the trustee shall not be compellable to be admitted thereto, but may deal therewith as if such property had been surrendered or conveyed to such uses as the trustee might appoint, and any appointee of the trustee shall be admitted or otherwise invested with the property accordingly (u).

The trustee is empowered to deal with any property to which the bankrupt is entitled as tenant in tail in the same manner as the bankrupt might have dealt with the same, and to exercise any powers the capacity to exercise which is vested in him by the act; and also to sell the property of the bankrupt by public auction or private contract, and to give receipts for money received by him, which receipts shall effectually discharge the person paying the money from all responsibility in respect thereof (x).

(s) 32 & 33 Vict. c. 71, s. 17.

(t) Gen. Rule, 105.

(u) 32 & 33 Vict. c. 71, s. 22.

(x) *Ib.* s. 25.

Payments, contracts, conveyances or dealings to or with a bankrupt, made in good faith and for valuable consideration, before the date of the order of adjudication, with any person not having at the time of making such payment, &c. notice of any act of bankruptcy committed by the bankrupt and available against him for adjudication, are to be valid notwithstanding a prior act of bankruptcy (*y*).

Upon application by motion by any person claiming to be a mortgagee, or to have security over any part of the bankrupt's estate or effects real or personal, and whether such mortgage or security shall be by deed or otherwise, and whether the same shall be of a legal or equitable nature, the court will inquire whether such person is such mortgagee, and will take an account of the principal, interest and costs due upon such security, and will direct a sale thereof, and the trustee (unless it be otherwise ordered) shall have the conduct of such sale, but it shall not be imperative on any such mortgagee to make such application (*z*); and all proper parties shall join in the conveyance to the purchaser where necessary, as the court shall direct (*a*).

The Bankruptcy Act, 1869, has been repealed by the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and the law of bankruptcy, after the 31st of December, 1883, will be regulated by the last-named act, which (sects. 21, 22)

(*y*) 32 & 33 Vict. c. 71, ss. 94, 95. 78.

(*z*) Gen. Rule in Bankruptcy, (a) *Id.* 79.

s.

contains similar provisions for the appointment of a trustee and committee of inspection of the bankrupt's estate to those in the former act; and the description of the property of the bankrupt divisible amongst his creditors is, by sect. 44 of the new act, similar to sect. 15 of the former act.

The Act of 1883 (sect. 66) provides for the appointment of an official receiver of debtors' estates who, until a trustee is appointed (sect. 54), or during any vacancy in that office (sect. 70 g), is to act as a trustee for the purposes of the act.

It is provided, by sect. 54, that on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed, and shall pass from trustee to trustee, including the official receiver, when he fills that office, and shall vest in the trustee for the time being during his continuance in office without any conveyance, assignment, or transfer whatever; and the certificate of appointment of a trustee shall, for all purposes of any law in force in any part of the British dominions requiring registration, inrolment, or recording of conveyances or assignments of property, be deemed to be a conveyance or assignment of property, and may be registered, enrolled, and recorded accordingly.

The new act (sect. 50) contains similar provisions to those contained in the former act for enabling the trustee to deal with property of copyhold or customary tenure in the same manner as if it had been conveyed

to such uses as the trustee should appoint ; and sect. 56 of the new act confers on the trustee similar powers of realization of the bankrupt's property, and otherwise dealing with the same, to those contained in the Act of 1869. The same protection to *bonâ fide* payments, conveyances for valuable consideration, and other transactions with the bankrupt, is, by sect. 49 of the new act, extended to persons not having notice of any available act of bankruptcy, provided the payment, conveyance, or transaction, takes place before the date of a receiving order, as was conferred by sects. 94 and 95 of the former act.



SECTION 15.

*Powers conferred by Act abolishing Forfeitures for
Treason and Felony.*

The act abolishing forfeitures for treason and felony (b) enacts, that it shall be lawful for her Majesty, or for any person in that behalf authorized by her Majesty under her royal sign manual, if to her Majesty or the person so authorized it shall seem fit, by writing under her Majesty's royal sign manual, or under

(b) 33 & 34 Vict. c. 23.

the hand of the person so authorized as aforesaid, to commit the custody and management of the property of any person against whom after the passing of the act (4th of July, 1870) judgment of death or of penal servitude shall have been pronounced or recorded by any court of competent jurisdiction in England, Wales or Ireland, upon any charge of treason or felony (c), during her Majesty's pleasure, to an administrator to be by such writing appointed in that behalf, which appointment may be revoked and a new administrator appointed, who shall, upon his appointment, be deemed to be the successor-in-law of the former administrator, and all property vested in and all former powers given to such former administrator by virtue of the act shall thereupon devolve to and become vested in such successor, who shall be bound by all acts lawfully done by such former administrator during the continuance of his office; and the provisions thereafter contained with reference to any administrator shall, in the case of the appointment of more than one person, apply to such administrators jointly (d).

Upon the appointment of any such administrator in manner aforesaid, all the real and personal property, including choses in action, to which the convict named in such appointment was at the time of his conviction, or shall afterwards, while he shall continue subject

(c) 33 & 34 Vict. c. 23, s. 6.

(d) *Id.* s. 9.

to the operations of the act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein (e).

The administrator shall have absolute power to let, sell, mortgage, convey and transfer any part of such property as to him shall seem fit (f).

The act also provides for the appointment of an interim curator, if no such administrator shall have been appointed, and confers various powers upon such curator with reference to the management of the convict's property (g).



SECTION 16.

Powers conferred by Vendor and Purchaser Act, 1874.

This act (h), which came into operation on the 1st January, 1875,—after, by the second section thereof, subjecting the rights of vendors and purchasers to certain rules with reference to evidence of title, production of title deeds, and otherwise, which are usually made the subject of special provisions, and which rules are treated of in these pages in their respective places,

(e) 33 & 34 Vict. c. 23, s. 10. sections.

(f) *Ib.* s. 12.

(h) 37 & 38 Vict. c. 78.

(g) *Ib.* s. 21, and following

—provides that trustees who are either vendors or purchasers may sell or buy without excluding the application of such second section (i); and, consequently, when trustees are empowered to purchase land for the purposes of their trust, the instrument creating which trust may not authorize them to accept a deduction of title for a less period than sixty years, they may now purchase with a forty years' title only, and conditions to the effect of the several sub-sections of this section of the act (k) will not as previously be considered special conditions.

The act then goes on to provide that the legal personal representative of a mortgagee of a freehold estate or of a copyhold estate to which the mortgagee shall have been admitted, may, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate, whether the mortgage be in form an assurance subject to redemption or an assurance upon trust (l).

Upon the death of a bare trustee of any corporeal or incorporeal hereditament, of which such trustee was seised in fee simple, such hereditament shall vest, like a chattel real, in the legal personal representative from time to time of such trustee (m).

When any freehold or copyhold hereditaments shall be vested in a married woman as a bare trustee, she

(i) 37. & 38 Vict. c. 78, s. 3.

(l) *Ib.* s. 4.

(k) *Ib.* s. 2.

(m) *Ib.* s. 5.

may convey or surrender the same as if she were a feme sole (n).



SECTION 17.

Powers conferred by the Conveyancing and Law of Property Act, 1881.

This act came into operation on the 1st of January, 1882, and contains provisions relating to sales and other transactions which are treated of in these pages in their respective places, and also contains some very important powers relating to mortgagees, trustees and executors, which are here set forth.

“15.—(1) Where a mortgagor is entitled to redeem, he shall, by virtue of this act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this act, be bound to assign and convey accordingly.

“(2) This section does not apply in the case of a mortgagee being or having been in possession.

“(3) This section applies to mortgages made either before or after the commencement of this act, and shall

(n) 37 & 38 Vict. c. 78, s. 6.

have effect notwithstanding any stipulation to the contrary."

The Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 12, provides that the right of the mortgagor under Section 15 of the Conveyancing and Law of Property Act, 1881, to require a mortgagee instead of re-conveying to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance, but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer.

"16.—(1) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this act, be entitled from time to time, at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

"(2) This section applies only to mortgages made after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

"17.—(1) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this act, be entitled to do so, without paying any money due under any

separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

“(2) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

“(3) This section applies only where the mortgages or one of them are or is made after the commencement of this act.

“18.—(1) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

“(2) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this act, power to make from time to time any such lease as aforesaid.

“(3) The leases which this section authorizes are—

“(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

“(ii.) A building lease for any term not exceeding ninety-nine years.

“(4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

“(5) Every such lease shall be made to take effect in possession not later than twelve months after its date.

“(6) Every such lease shall reserve the best rent that

can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

“(7) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

“(8) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

“(9) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair buildings within that time, or having executed, or agreeing to execute within that time, on the land leased, an improvement for or in connexion with building purposes.

“(10) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

“(11) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the

mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

“(12) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

“(13) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained.

“(14) Nothing in this act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

“(15) Nothing in this act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this act had not been passed.

“(16) This section applies only in case of a mortgage made after the commencement of this act; but the pro-

visions thereof, or any of them, may, by agreement in writing made after the commencement of this act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

“(17) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

“19.—(1) A mortgagee, where the mortgage is made by deed, shall, by virtue of this act, have the following powers, to the like extent as if they had been in terms conferred by the mortgage deed, but not further (namely):

“(i.) A power, when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction, or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby; and

- “(ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate as the mortgage money; and
- “(iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof; and
- “(iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

“(2) The provisions of this act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like

incidents, effects, and consequences, as if such variations or extensions were contained in this act.

“(3) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained.

“(4) This section applies only where the mortgage deed is executed after the commencement of this act.

“20. A mortgagee shall not exercise the power of sale conferred by this act unless and until—

“(i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service; or

“(ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or

“(iii.) There has been a breach of some provision contained in the mortgage deed or in this act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

“21.—(1) A mortgagee exercising the power of sale conferred by this act shall have power, by deed, to

convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf.

“(2) Where a conveyance is made in professed exercise of the power of sale conferred by this act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

“(3) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any,

due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

“(4) The power of sale conferred by this act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.

“(5) The power of sale conferred by this act shall not affect the right of foreclosure.

“(6) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this act or of any trust connected therewith.

“(7) At any time after the power of sale conferred by this act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him.

“**22.**—(1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring

the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage.

“(2) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this act directed respecting money received by him arising from a sale under the power of sale conferred by this act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

“23.—(1) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in case of total destruction, to restore the property insured.

“(2) An insurance shall not, under the power conferred by this act, be effected by a mortgagee in any of the following cases (namely):

“(i.) Where there is a declaration in the mortgage deed that no insurance is required:

“(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

“(iii.) Where the mortgage deed contains no stipulations.

tion respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this act authorized to insure.

“(3) All money received on an insurance effected under the mortgage deed or under this act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

“(4) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

“**24.**—(1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this act, but may then, by writing under his hand, appoint such person as he thinks fit to be a receiver.

“(2) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

“(3) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the

mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

“(4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

“(5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing under his hand.

“(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the court thinks fit to allow, on application made by him for that purpose.

“(7) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

“(8) The receiver shall apply all money received by him as follows (namely) :

“(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

- “ (ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and
- “ (iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and
- “ (iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property.

“ **25.**—(1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

“ (2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, notwithstanding the dissent of any other

person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.

“(3) But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

“(4) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

“(5) This section applies to actions brought either before or after the commencement of this act.

“(6) The enactment described in Part II. of the second schedule to this act is hereby repealed.

“(7) This section does not extend to Ireland.

“**26.**—(1) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the third schedule to this act, with such variations and additions, if any, as circumstances may

require, and the provisions of this section shall apply thereto.

“(2) There shall be deemed to be included, and there shall by virtue of this Act be implied, in the mortgage deed—

“First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely) :

“That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money :

“Secondly, a proviso to the effect following (namely) :

“That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

“27.—(1) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the

three forms (A.) and (B.) and (C.) given in Part II. of the third schedule to this act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

“(2) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

“(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated as transferee, the right to demand, sue for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee :

“(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

“(3) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely) :

“That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money,

or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

“(4) If the deed of transfer is made in the form (C.), it shall, by virtue of this act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

“28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

“29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory reconveyance of mortgage, being in the form given in Part III. of the third schedule to this act, with such variations and additions, if any, as circumstances may require.

“30.—(1) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

“ (2) Section four of the Vendor and Purchaser Act,

1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed.

“(3) This section, including the repeals therein, applies only in cases of death after the commencement of this act.

“31.—(1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for this purpose by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit, or being incapable, as aforesaid.

“(2) On an appointment of a new trustee, the number of trustees may be increased.

“(3) On an appointment of a new trustee, it shall not be obligatory to appoint more than one new trustee, where only one trustee was originally appointed, or to fill up the original number of trustees, where more than two trustees were originally appointed; but, except

where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust.

“(4) On an appointment of a new trustee any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

“(5) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

“(6) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator; and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

“(7) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

“(8) This section applies to trusts created either before or after the commencement of this act.

“32.—(1) Where there are more than two trustees, if one of them by deed declares that he is desirous of

being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this act, without any new trustee being appointed in his place.

“(2) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

“(3) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

“(4) This section applies to trusts created either before or after the commencement of this act.

“**33.**—(1) Every trustee appointed by the Court of Chancery, or by the Chancery Division of the Court, or by any other court of competent jurisdiction, shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

“(2) This section applies to appointments made either before or after the commencement of this act.

“**34.**—(1) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and, for the purposes of the trust, that estate, interest, or right.

“(2) Where a deed, by which a retiring trustee is discharged under this act, contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and for the purposes of the trust, the estate, interest, or right to which the declaration relates.

“(3) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner prescribed by or under Act of Parliament.

“(4) For purposes of registration of the deed in any registry, the person or persons making the declaration

shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this act.

“(5) This section applies only to deeds executed after the commencement of this act.

“**35.**—(1) Where a trust for sale or a power of sale of property is vested in trustees, they may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title, or other matter, as the trustees think fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss.

“(2) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

“(3) This section applies only to a trust or power created by an instrument coming into operation after the commencement of this act.

“**36.**—(1) The receipt in writing of any trustees or trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to them or him under any trust or power shall be a sufficient discharge for the same, and shall effectually

exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

“(2) This section applies to trusts created either before or after the commencement of this act.

“37.—(1) An executor may pay or allow any debt or claim on any evidence that he thinks sufficient.

“(2) An executor, or two or more trustees acting together, or a sole acting trustee where, by the instrument, if any, creating the trust, a sole trustee is authorized to execute the trusts and powers thereof, may, if and as he or they think fit, accept any composition, or any security, real or personal, for any debt, or for any property, real or personal, claimed, and may allow any time for payment of any debt, and may compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things, as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

“(3) As regards trustees, this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

“(4) This section applies to executorships and trusts constituted or created either before or after the commencement of this act.

“38.—(1) Where a power or trust is given to or vested in two or more executors or trustees jointly, then, unless the contrary is expressed in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being.

“(2) This section applies only to executorships and trusts constituted after or created by instruments coming into operation after the commencement of this act.”



SECTION 18.

Effect of Part Performance of Contract.

Notwithstanding the Statute of Frauds requires a contract for sale of lands to be in writing, courts of equity acted upon the doctrine that parol agreements were taken out of the statute by a part performance thereof (*o*). This doctrine was not recognized at law, and parol evidence was not admissible in a court of law to vary a written contract (*p*), but now the High Court

(*o*) *Mundy v. Jolliffe*, 5 My. & Cr. 167; *Powell v. Lovegrove*, 8 De G., M. & G. 357; *Sutherland v. Briggs*, 1 Hare, 26; *Laird v. Birkenhead Rail. Co.*, John. 500.

(*p*) *Goss v. Lord Nugent*, 2 Nev. & Man. 33; *Davis v. Symonds*, 1 Cox, 402. See 3 Wils. 276; *Foot v. Salway*, 2 Cha. Ca. 142.

of Justice administers the same relief on equitable grounds as was formerly given exclusively in the Court of Chancery (*q*).

The fraud of one of the parties to a contract, by means whereof the requirements of the statute have not been complied with, will not avail him, and the party thus defrauded will be entitled to relief on proof of the fraud and the existence of a parol contract (*r*).

Delivery of possession is a sufficient part performance by a vendor to enable him to compel the specific performance of a contract to purchase (*s*); and acceptance of possession by a purchaser is sufficient to enable him to compel specific performance of the vendor's contract to sell (*t*), unless the contract provide to the contrary (*u*); so also has been the expenditure of money on the premises by a tenant in possession on the faith of a parol agreement (*x*); but the verbal agreement of a tenant for life to grant a lease in execution of a power, followed by expenditure of the intended lessee on the faith thereof, cannot be enforced against the remainder-

(*q*) 36 & 37 Vict. c. 66, s. 24, sub-ss. 1, 2.

(*r*) *Whitchurch v. Bevis*, 565; *Morse v. Merest*, 6 Madd. 26.

(*s*) *Buckmaster v. Harrop*, 13 Ves. 456; *Reynolds v. Waring*, You. 351; *Fleetwood v. Green*, 15 Ves. 594; *Burnell v. Brown*, 1 Jac. & W. 168; *Nunn v. Fabian*, 1 L. R., Ch. 35. But mere taking of possession does not amount to

an acceptance of title; *Prid. Con. tit. Agreements*.

(*t*) *Gregory v. Mighell*, 18 Ves. 328; *Morphett v. Jones*, 1 Swanst. 172.

(*u*) *Bolton v. London School Board*, 7 L. R., Ch. D. 766.

(*x*) *Wills v. Stradling*, 3 Ves. 382; *Ex parte Hooper*, 19 Ves. 479.

man, unless it can be shown that such remainderman permitted the expenditure with a knowledge that the agreement was verbal merely (*y*).

Part payment of the purchase-money will not take a case out of the statute (*z*) ; neither will delivery of an abstract, giving instructions for the preparation of conveyance or making valuations, &c. (*a*).

Where several lots of an estate are purchased, included in distinct articles of sale, part performance as to one lot will not be considered part performance as to the others (*b*).

(*y*) *Blors v. Sutton*, 3 Mer. 237 ;
Trotman v. Fletcher, 3 Giff. 1.

(*z*) Sugd. V. & P. 152. See
also *Clinan v. Cooke*, 1 Sch. & Lef.
22 ; *O'Herlihy v. Hedges*, 14 Ves.
jun. 388.

(*a*) *Clerk v. Wright*, 1 Atk. 12 ;
Whitbread v. Brockhurst, 1 Bro.
C. C. 412 ; *Cole v. White*, 1 Bro.
C. C. 409.

(*b*) *Buckmaster v. Harrop*, 13
Ves. 456.

CHAPTER V.

DESCRIPTION OF ESTATE.

SECTION 1.

What the Contract should disclose.

THE contract should contain a minute and accurate description of the estate the subject of the sale (*a*); it should also state the tenure by which it is holden, and leases or tenancies to which the property is subject should be mentioned; for in the absence of restrictive expressions an agreement to sell land will include not only the whole of the vendor's interest in it (*b*), but such interest will be deemed to be an estate in fee simple (*c*), accompanied by the rights incident to such an interest (*d*).

All latent defects in the estate of which the vendor or his agent may be aware must be disclosed (*e*), but patent defects in an estate need not be called to the

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| <p>(<i>a</i>) <i>Calverley v. Williams</i>, 1 Ves. jun. 210.</p> <p>(<i>b</i>) <i>Bower v. Cooper</i>, 2 Ha. 408.</p> <p>(<i>c</i>) <i>Hughes v. Parker</i>, 8 M. & W. 244.</p> <p>(<i>d</i>) <i>Pope v. Garland</i>, 4 Y. & C. 403; <i>Seaman v. Vawdrey</i>, 16 Ves. 390; <i>Gibson v. Spurrier</i>, Pea. Ad.</p> | <p>C. 50; <i>Horniblow v. Shirley</i>, 13 Ves. jun. 81; <i>Burnell v. Brown</i>, 1 Jac. & W. 168; <i>Vancouver v. Bliss</i>, 11 Ves. jun. 458.</p> <p>(<i>e</i>) <i>Mellish v. Motteux</i>, 1 Pea. N. P. C. 156; <i>Martin v. Cotter</i>, 3 J. & L. 496; <i>Lucas v. James</i>, 7 Hare, 410.</p> |
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notice of the purchaser, even though the vendor be acquainted with them; there must, however, be no concealment on the part of the vendor (*g*).

It is unnecessary for a contract to refer to any charge which is incident to land; thus land tax, though not mentioned in the agreement, is presumed to be a charge,—so also is tithe; and a purchaser is bound to take the estate subject to these charges, unless indeed the contract states the land tax to have been redeemed, or that the property is free from tithe (*h*); and on a sale of copyholds the fines or customs of the manor need not be stated (*i*), or if it appears from the contract that the land though freehold is held of a manor, it is not necessary (though certainly desirable) to refer to quit rents or heriots which may be a charge thereon (*k*).

An underlease must not be described in the contract as a lease (*l*), but should the purchaser be aware that the vendor's interest is an underlease only, he will be bound, though the contract describe the interest as a lease (*m*); but the fact that the covenants in a lease are unusually stringent need not be noticed (*n*). When a lease contains the usual covenant to deliver up the premises in good repair at the end of the term, and any of the demised buildings have been removed, the fact should

(*g*) Sugd. V. & P. 2.

& S. 718.

(*h*) *Ib.* 322.

(*m*) *Flood v. Fritchwood*, 40 L.

(*i*) *White v. Cuddon*, 8 Cl. & F. 766.

T. 873; *Camberwell, &c. Society v. Holloway*, 13 Ch. D. 754.

(*k*) Dart, V. & P. 118.

(*n*) *Hall v. Smith*, 14 Ves. 426;

(*l*) *Madeley v. Booth*, 2 De G.

Paterson v. Long, 6 Beav. 590.

be stated (*o*); so also should the circumstance of the lease comprising property not included in the sale (*p*).

On the sale of building ground the exhibition on the plan of intended improvements on the adjacent land will not bind the vendor to execute such improvements (*q*); and when a house is sold with all its lights a statement in the contract that the adjoining land is building land will not authorize the vendor or a purchaser from him of such adjoining land to build thereon so as to obstruct such lights (*r*); and the owner of a house having the enjoyment of certain lights, also possessing the adjoining land, and selling the house to another person, cannot build upon the adjoining land and obstruct the enjoyment of such lights (*s*).



SECTION 2.

As to Timber, growing Crops and Fixtures.

If the contract does not state that the timber or other trees on the estate are to be paid for separately; they will be included in the contract (*t*). If, however, they are to be paid for by the purchaser, it should be accurately stated for what trees he is to pay; and if it be merely stipulated that timber is to be paid for, the pur-

(*o*) *Granger v. Worms*, 4 Camp. 83.

(*p*) *Tomkins v. White*, 3 Smith, 435.

(*q*) *Fooffees of Heriot's Hospital v. Gibson*, 2 Dow, 301; *Squire v.*

Campbell, 1 My. & Kee. 459.

(*r*) *Swansborough v. Coventry*, 9 Bing. 305.

(*s*) *Dart, V. & P.* 122.

(*t*) *Higginson v. Clowes*, 15 Ves. 516.

chaser will have to pay for trees not strictly timber, if considered so according to the custom of the country (*u*). Wood is not timber until of twenty years' growth (*v*), and the term timber includes oak, elm and ash, and by local custom, birch, beech and other trees (*w*); and the expression timber and timberlike trees has been held to include sound pollards (*x*).

Where timber upon a copyhold estate, or upon an estate part freehold and part copyhold, is to be paid for separately, it should be borne in mind that if the contract is sufficiently explicit upon the point, the timber upon the copyhold portion of the property will be included in the valuation, even though the copyhold portion cannot be distinguished from the freehold, and the purchaser will be compelled to take it subject to the right of the lord and custom of the manor. But if the contract for the purchase of the timber be separate from that of the estate, the purchaser will be entitled to such possession of it as will entitle him to fell and remove it (*y*).

If no mention is made as to separate payment for common fixtures, they will be included in the contract, unless the contrary may be gathered from the context (*z*).

(*u*) *Duke of Chandos v. Talbot*, 2 P. Wms. 606.

(*v*) *Foster v. Leonard*, Cro. Eliz. 1.

(*w*) *Duke of Chandos v. Talbot*, 2 P. Wms. 606; *Aubrey v. Fisher*, 10 East, 446.

(*x*) *Rabbett v. Raikes*, Woodfall, L. & T. 490; *Channon v. Patch*, 5 B. & C. 893.

(*y*) *Crosse v. Lawrence*, 9 Hare, 462.

(*z*) *Colegrave v. Dias Santos*, 2 Barn. & Cress. 76; *Manning v.*

If the property be in land, and nothing be said in the contract as to growing crops thereon, they will belong to the purchaser from the day fixed for completion (a).

SECTION 3.

As to Misdescription of the Estate.

A misdescription in the contract would formerly render it void at law, but in equity it was frequently enforced, subject to the right of the purchaser to have an abatement of his purchase-money by way of compensation (b), unless, indeed, the purchaser was aware of the state of the property at the time of the purchase (c), and having regard to sect. 25, sub-sect. 11, of the Judicature Act, 1873, the equitable principle will now govern all contracts; but if the misdescription is not susceptible of compensation, or in the event of any wilful misstatement on the part of the vendor, or if the estate is altogether different to that described in the contract, or the misdescription is such that it is reasonable to suppose that but for such misdescription the purchaser would not have entered into the contract, it may be stated, as the result of the cases

Bailey, 2 Exch. 45; *Ex parte Lloyd*, 1 Mon. & Ayr. 494; *Hare v. Horton*, 5 B. & Adol. 715; *Longstaff v. Meagoe*, 2 Adol. & E. 162; *Hitchman v. Walton*, 4 Mee. & Wels. 409.

(a) *Dart, V. & P.* 132.

(b) *Painter v. Newby*, 11 Hare, 26; *Brandley v. Plummer*, 2 Drew. 427; *Dyer v. Hargrave*, 10 Ves. 505; *Hoy v. Smithies*, 22 Beav. 510; *Leyland v. Illingworth*, 4 De G., F. & J. 248.

(c) *Farebrother v. Gibson*, 1 De G. & J. 602.

purchaser both at law and in equity (*o*); though a false statement by a vendor that a third person had offered a certain specified sum for the property, though relied upon by the purchaser, did not render the vendor liable in an action at law (*p*). And it has been held, that a purchaser may recover against a vendor for falsely stating the rent, although such purchaser did not depend upon the statement, but made inquiries as to what the property let at (*q*).

Compensation must be claimed before the conveyance is executed, as afterwards in the absence of fraud it cannot be obtained, even though the misrepresentation related to the subject-matter of the conveyance (*r*).



SECTION 4.

Duty of the Purchaser.

A purchaser, though not bound to call to the attention of a vendor any circumstance unknown to him which would tend to increase the value of the property itself, such as the existence of a mine (*s*), still in equity

(*o*) *Attwood v. Small*, 6 Cl. & F. 232; *Small v. Attwood*, 1 You. 407; *Pike v. Vigers*, 2 Drew. & Wal. 1, 150; *Buxton v. Lister*, 3 Atk. 386; *Partridge v. Osborne*, 5 Russ. 195; *Powell v. Edmunds*, 12 East, 11.

(*p*) Sugd. V. & P. 2.

(*q*) *Lysney v. Selby*, 2 Id. Raym. 1118.

(*r*) *Bos v. Helsham*, 2 L. R., Ex. 72; *Morrison v. Thacker*, 7 L. R., Ch. D. 1, 620.

(*s*) 2 Bro. C. C. 420.

a purchaser is bound to disclose a fact unknown to the vendor which would increase his interest in the property, such as the actual or imminent death of a prior tenant for life (*t*). And the insertion by mistake in a contract of a description including an entire property, when it was the *bonâ fide* intention of the vendor to sell a part only (*u*), and where, upon a sale in lots, one of such lots contained considerably more than the quantity mentioned in the particulars, are cases which have been held to entitle a vendor to be relieved from the contract (*v*).

(*t*) *Turner v. Harvey*, Jac. 169 ;
Ellard v. Lord Llandaff, 1 Ba. &
B. 241.

(*u*) *Calverley v. Williams*, 1 Ves.
210.

(*v*) *Leslie v. Thompson*, 9 Hare,
268.

CHAPTER VI.
AS TO STIPULATIONS INSERTED IN
CONTRACT.

SECTION I.

Time for Completion of Purchase.

It is now proposed to consider the stipulations usually inserted in contracts for sale of real estate, both by public auction and private contract.

In whichever mode the sale is effected, the articles of agreement or the conditions of sale should stipulate for the completion of the purchase on a day certain to be named therein; and the time so named, until the Judicature Act, 1873 (*a*), which came into operation on the 1st November, 1875, would at law have been of the essence of the contract, but in equity would only have been so held in cases of express stipulation to that effect, or necessary implication (*b*); but now stipulations on contracts, as to time or otherwise, which would not before the passing of the act have been deemed to be or to

(*a*) 36 & 37 Vict. c. 66.

536; *Roberts v. Bury*, 3 De G.,

(*b*) *Parkin v. Thorold*, 16 Beav.

M. & G. 391.

59; *Hudson v. Temple*, 29 Beav.

have become the essence of such contract in a Court of Equity, are to receive in all courts the same construction and effect as they would have theretofore received in a Court of Equity (*c*). Where no time is fixed for completion, the vendor will be entitled to a reasonable time for making out his title (*d*); and if the purchaser do not in such a case apply to the vendor for the title before bringing an action, if the vendor can make a good title at the time of trial it will be sufficient, and his having had a defective title at the time of the contract will be immaterial (*e*); but where a contract provides that possession shall be given by a certain day, the word "possession" must be understood to be possession with a good title; and where a person agreed to purchase a leasehold property, and the contract provided for possession on a certain day, and though possession was tendered, but a good title not shown, it was held the stipulation as to time was the essence of the contract, and a bill for specific performance at the instance of the vendor was dismissed (*f*).

Although time may not have been originally an essential part of the contract, either party may, by notice, require the other to complete within a reasonable time to be specified in the notice; and if the party to whom such notice be given do not complete accordingly, equity will not assist him to enforce a specific perform-

(*c*) 36 & 37 Vict. c. 66, s. 25, sub-a. 7.

(*d*) *Sansom v. Rhodes*, 6 Bing. N. C. 261.

(*e*) *Thomson v. Miles*, 1 Esp. 184.

(*f*) *Tilley v. Thomas*, 3 L. R., Ch. 61.

ance of the contract. But if it appear to the court that the means exist of completing within a reasonable time, and the time given is insufficient, it will not give effect to such notice (g).

SECTION 2.

Interest on Purchase-money.

The contract usually provides for payment of interest if, from any cause whatever, the purchase is not completed at the time named in the contract; and it is now well settled that under such a condition interest is payable where the delay is not wilful on the part of the vendor, but is occasioned by the state of the title (h).

In the absence of stipulation to the contrary a purchaser is liable to pay interest at 4l. per cent. from the day fixed for completion if the purchase is not then completed (i), from which day he becomes entitled to the rents and profits of the estate; but where the delay

(g) Prid. Con. tit. "Conditions of Sale;" *Walker v. Jefferys*, 1 Hare, 341; *Benson v. Lamb*, 9 Beav. 502; *Nott v. Ricard*, 22 Beav. 307; *Southcomb v. Bishop of Exeter*, 6 Hare, 213; *Parkin v. Thorold*, 16 Beav. 59; *Wells v. Maxwell*, 32 Beav. 550.

(h) *Sherwin v. Shakespeare*, 5 De G., M. & G. 517; *Vickers v. Hand*, 26 Beav. 630; *Litchfield v. Brown*, 23 L. J., Ch. 176; *Tewart*

v. Tewart, 3 S. & G. 307; *Storry v. Walsh*, 18 Beav. 559; *Rosley v. Adams*, 12 Beav. 476; *Bannerman v. Clark*, 3 Drew. 632; *Perry and others v. Smith*, 1 Car. & M. 554; *Lord Palmerston v. Turner*, 23 L. J., Ch. 457; *Williams v. Glendon*, 1 L. R., Ch. Ap. 200.

(i) *Wallis v. Sorrell*, 5 De G. & Sm. 429.

is not occasioned by his own default, he may give the vendor notice that the purchase-money is lying idle, and thus escape payment of interest (*k*). The usual course, however, is to deposit the money with a banker, so that the vendor may have the benefit of the deposit interest.

The interest usually stipulated for by the contract is 5*l*. per cent., and it occasionally happens with reference to freeholds, though more frequently with reference to leaseholds, that the rents and profits to which the purchaser becomes entitled from the day fixed for completion are greater in amount than the interest for which he is liable; and this circumstance sometimes induces a purchaser to postpone the completion for as long a time after the day fixed as practicable. It is therefore desirable, in cases of this description, to provide by the contract, that, in the event of delay, the rents and profits shall be apportioned up to the time of completion and paid with the purchase-money.



SECTION 3.

Deposit.

It is usual to stipulate by the contract for a deposit by the purchaser in part payment of the purchase-money (except in cases of sales by auction by the Court

(*k*) *Dyson v. Hornby*, 4 De G. & Sm. 481; *Regent's Canal Co. v. Ware*, 23 Beav. 575.

of Chancery). In sales by auction, the conditions usually provide, that the deposit shall be paid to the auctioneer, and until the purchase is completed he is a mere stakeholder, and must not part with it without the consent of both vendor and purchaser. The rule does not, however, apply in the event of the solicitor for the vendor receiving the deposit, and should he receive it as agent for the vendor, he must pay it over to him on demand (*l*).

It is usual to provide, that if the purchaser shall neglect to comply with the conditions, such deposit money shall be retained by the vendor as liquidated damages, and that the vendor shall be at liberty to resell the property, and that the deficiency in price on such second sale, and the expenses attending the same, shall be made good by the purchaser making default, and, in case of non-payment thereof, the same shall be recoverable as liquidated damages. This stipulation will entitle the vendor to resell the estate and recover the deficiency and expenses from the purchaser; but if upon a resale the estate were to produce more than the original purchase-money, the purchaser making default could not call for an account of the surplus (*m*). A vendor cannot, however, after a sale at a loss, sue for the original purchase-money, but only for the expenses of the resale and loss (*n*); and it is assumed, that if the contract

(*l*) *Edgell v. Day*, 1 L. R., C. jun. 94.
P. 80.

(*n*) *Lamond v. Darvall*, 9 Q. B.

(*m*) *Ex parte Hunter*, 6 Ves. 1020.

clearly states that the purchaser making default is to forfeit the deposit, the verdict in an action for breach of the contract would entitle the vendor to the forfeiture stipulated for (o); but if the purchaser become bankrupt, equity will set off the deposit against any deficiency (p); and it may be remarked, that if a purchaser, after breaking the condition, becomes bankrupt, and the estate is resold at a loss, the expenses of sale, being in the nature of unliquidated damages arising under a contract, may now be proved under the adjudication (q).

Where there is no provision in the contract for forfeiture of the deposit, such forfeiture will depend upon the intention of the parties, to be collected from the whole instrument (r), and the purchaser cannot elect to forfeit it and avoid the agreement.

If the deposit is large in amount its investment between the sale and the completion of the purchase is frequently provided for, in which case the vendor will be entitled to any increase, and must bear any loss in the value of the investment (s).

Should the purchase be vacated by reason of a defect in the title, the purchaser will be entitled to receive the deposit with interest from the time of payment, together

(o) Sugd. V. & P., Ch. 1, s. 2, and cases cited. See also *Hinton v. Sparks*, 3 L. R., C. P. 161; *Ex parte Barrell*, *In re Parnell*, 10 L. R., Ch. 512.

(p) *Ex parte Hunter*, 6 Ves.

(q) 32 & 33 Vict. c. 7, s. 31.

(r) *Palmer v. Temple*, 9 Ad. & E. 508; and see *Depree v. Bedborough*, 4 Giff. 479.

(s) *Burroughes v. Brown*, 9 Hare, 609.

with his costs of investigating the title (*t*), and he will have a lien on the estate for the deposit (*u*).

It is now, therefore, a common condition that, if any requisition shall be insisted upon by a purchaser which the vendor shall be unable or unwilling to remove, he may at any time, notwithstanding any attempt to remove or comply with or any negotiation or litigation in respect of such requisition, annul the sale upon returning the deposit without interest or costs of investigating title or other compensation.

This condition is construed strictly, and will not enable the vendor to avoid the duty attaching to him upon the rest of the contract to make out the title, and he is consequently bound to give the best answer in his power to the purchaser's requisitions and leave him to say whether he will accept the vendor's title as it stands (*v*).

The contract frequently provides that it shall not be necessary for a vendor to tender a conveyance or assignment to the purchaser previously to forfeiting the deposit and reselling the property; but this is in most cases unnecessary, having regard to the manner in which contracts are usually framed, as it is now well settled that the vendor need not tender a conveyance or assignment when the purchaser is required to prepare it

(*t*) *Pounsett v. Fuller*, 17 C. B. 660; *Sikes v. Wild*, 7 Jur., N. S. 1280.

(*u*) *Wythes v. Lee*, 3 Drew. 396.

(*v*) *Turpin v. Chambers*, 29 Beav. 104; *Nelthorpe v. Holgate*, 1 Coll. 203; *Greaves v. Wilson*, 25 Beav. 290.

or bear the expense of its preparation (*w*)—provisions inserted in every well-drawn contract. Again, if a day be appointed for payment of purchase-money or any part of it, it would appear an action might be brought for the money, though the vendor might not have tendered a deed of transfer; but it is assumed that if the contract is silent on these points as to preparation of conveyance or assignment and time of payment, a conveyance should be tendered by the vendor before seeking to enforce his rights under the contract, the rule being that mutual engagements of parties are dependent on each other, and either must, unless discharged therefrom by the other, perform his liability before he seeks to enforce such right (*x*).



SECTION 4.

Delivery of the Abstract.

The contract generally provides that the vendor shall, within a given time, deliver to the purchaser or his solicitor an abstract of the title; but the vendor is bound to deliver such abstract independently of such a condition. Should a time be named for delivery of the abstract it should be delivered accordingly, and at the time of such delivery it should be as perfect as the

(*w*) *Seward v. Willock*, 5 East, 198; *Hawkins v. Kemp*, 3 East, 410. (*x*) *Dart, V. & P.* 958; *Jones v. Barkley*, Doug. 659.

vendor can make it (*y*). The non-delivery of a perfect abstract on the day named in the contract would have relieved a purchaser therefrom at law (*z*), though in equity the purchaser will be bound if he neglect to apply for the abstract within a reasonable time before the day fixed for its delivery (*a*), or if, upon its being subsequently tendered, he receive it without objection (*b*); but the wilful default of a vendor to furnish an abstract within the proper time, when requested by the purchaser to do so, will entitle the purchaser in equity to be relieved from the contract when the time fixed for completion has expired (*c*).

The purchaser is also relieved from the usual condition, requiring that all requisitions and objections should be delivered within a given time from the delivery of the abstract, if the vendor does not deliver a perfect abstract within the time named; and such condition will take effect only from the delivery of a perfect abstract, and any objection arising out of a document called for within the prescribed time may be made notwithstanding such a condition (*d*). This condition will not preclude a purchaser from raising an objection after the prescribed time with reference to matters which may then be discovered (*e*).

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|---|--|
| (<i>y</i>) <i>Morley v. Cook</i> , 2 Ha. 111. | (<i>c</i>) <i>Seton v. Slade</i> , 7 Ves. 265. |
| (<i>z</i>) <i>Berry v. Young</i> , 2 Esp. 640. | (<i>d</i>) <i>Blacklow v. Laws</i> , 2 Hare, 40; <i>Hobson v. Bell</i> , 2 Beav. 17. |
| (<i>a</i>) <i>Guest v. Homfray</i> , 5 Ves. 818; <i>Jones v. Price</i> , 3 Anst. 924. | (<i>e</i>) <i>Ward v. Dickson</i> , 5 Jur., N. S. 345. |
| (<i>b</i>) <i>Smith v. Burnam</i> , 2 Anst. 527. | |

In order to guard against the rule just referred to with reference to the delivery of an incomplete abstract, it has become a common practice to provide that the time named for the delivery of objections and requisitions shall be of the essence of the contract, although the abstract delivered may not be perfect.



SECTION 5.

Restrictive Stipulations generally.

We now come to consider the stipulations frequently inserted in contracts for sale and purchase of real estate restrictive of the purchaser's right to such a deduction of title as in the absence of such stipulations he would be entitled to call for, and with reference to stipulations of this character, and, in fact, to all stipulations having a restrictive tendency, it is to be remarked that such stipulations must be expressed in terms the most clear and unambiguous (*f*); and if there be any misapprehension as to their meaning, they will be construed in favour of the person whose rights are restricted (*g*).

Persons acting in a fiduciary character, as we have seen, are usually authorized, by the document under which they derive their powers, to sell, subject to such special or other stipulations, either as to title or evidence

(*f*) *Symons v. Jones*, 1 Y. & C. C. C. 490. *Drysdale v. Mace*, 5 De G., M. & G. 103; *Webb v. Kirby*, 7 De G.,

(*g*) *Osborne v. Harvey*, 7 Jur. M. & G. 376; *Smith v. Watts*, 4 229; *Seaton v. Mapp*, 2 Coll. 556; *Drew*. 338.

of title, as they may think fit; but such an authority, though affording to a purchaser from them a valuable protection, would not authorize any obviously unnecessary conditions, unless, indeed, such authority were followed by a declaration that the use of unnecessary or improper conditions should not affect the sale (*h*); and Lord Cranworth's Act (*i*), to which we have already had occasion to refer, empowers trustees selling under a deed, will or other instrument executed after the passing of the act to insert any special or other stipulation as to title or evidence of title (*k*); but this act has now been repealed as from the 31st December, 1881 (*l*).

Without express authority on the subject, however, special conditions, warranted by the state of the title, may be and usually are inserted in the contract; thus, a trustee selling may, without special authority, stipulate for liberty to rescind the contract in the event of objections being taken which he is unable to remove (*m*). And it has been held, that a trustee was entitled to specific performance where, having no power to give receipts, he stipulated that his receipt should be taken as a conclusive discharge (*n*); but such a stipulation would now be unnecessary, having regard to the Conveyancing and Law of Property Act, 1881, s. 36, which empowers trustees in all cases to give receipts.

(*h*) Dart, V. & P. 174.

(*i*) 23 & 24 Vict. c. 145.

(*k*) *Ib.* s. 2.

(*l*) 44 & 45 Vict. c. 41, s. 71.

(*m*) *Hobson v. Bell*, 2 Beav. 17;

Faulkner v. Eq. Rev. Inst. Soc., 4 Drew. 352.

(*n*) *Wilkinson v. Hartley*, 15 Beav. 183.

SECTION 6.

Commencement of Title.

One of the most common conditions restrictive of the rights of a purchaser with reference to title is as to the commencement thereof; and the Conveyancing and Law of Property Act, 1881, sect. 3, sub-s. 3, provides—

“A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed.”

A condition that the abstract shall commence with a specific document will not preclude the purchaser from requiring the production of recited instruments appearing from such recitals to be of a suspicious character, nor, it is conceived, would the above provisions prevent a purchaser investigating the earlier title if he had the means of doing so (*o*).

(*o*) *Sellick v. Trevor*, 11 M. & W. 722; *Sheppard v. Keatley*, 1 C. M. & R. 117; *Keyse v. Hayden*, 20 L. T. R. 244; *Else v. Else*, 13 L. R., Eq. 196; *Harnell v. Baker*, L. R., 20 Eq. 50.

A vendor may stipulate for the production only of such title, or evidence of title, as he may have; and a purchaser, under such a stipulation, will be compelled to complete, although the title may be defective (*p*). But a stipulation that a purchaser shall be entitled to the production only of such of the documents of title as are in the vendor's possession, will not preclude the purchaser from requiring a good title to be deduced and otherwise satisfactorily verified (*q*); and where the contract states as a fact that the vendor has power to sell the fee, the purchaser is entitled to require the vendor to show such power (*r*).

SECTION 7.

Copies of Documents.

The Conveyancing and Law of Property Act, 1881, sect. 3, sub-s. 6, provides—

“On a sale of any property, the expenses of the production and inspection of all Acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production

(*p*) *Freme v. Wright*, 4 Madd. 364; *Willmott v. Wilkinson*, 6 B. & C. 506; *Southey v. Hutt*, 2 My. & Cr. 212; *Duke v. Barnett*, 2 Coll. C. C. 337.

(*q*) *Southey v. Hutt*, 2 My. & Cr. 207.

(*r*) *Johnson v. Smiley*, 17 Beav. 223.

or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any Acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same: and where the vendor retains possession of any document, the expenses of making any copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser."

SECTION 8.

Title Deeds.

Title deeds are frequently the subject of special conditions.

Upon the completion of the purchase, the purchaser is entitled to all deeds and documents in the vendor's possession or power relating to the property purchased, unless the vendor retains property to which such deeds relate (s). As to such title deeds and docu-

(s) Jarm. Con. by S. 63; *South v. Chichester*, 2 Dru. & W. 993; 37 & 38 Vict. c. 78, s. 2, r. 5. that the portion retained by the vendor should be of greater value.
Prior to this act it was necessary

ments as are necessary to a marketable title (*t*), not delivered to the purchaser, he is entitled to have attested copies thereof furnished to him by the vendor (*u*), but the Conveyancing and Law of Property Act, 1881, as we have just seen, throws the expense thereof on the purchasers requiring them.

The purchaser is also entitled to a covenant, or as it is now called by the Conveyancing and Law of Property Act, 1881, an acknowledgment from the vendor, or the person in whose custody the same may be, of the right of the purchaser to the production of documents, attested copies whereof he is entitled to have furnished to him; and such covenant, prior to the passing of the Vendor and Purchaser Act, 1874, must have been furnished free of expense, but now it is provided that such covenants for production as the purchaser can and shall require shall be furnished at his expense (*t*); but the expense of future productions must be borne by the party requiring them (*u*). Documents produced for the purpose of showing that they do not contain anything affecting the title are not within this rule (*x*).

The rights of a purchaser with reference to title deeds not in the vendor's possession or comprising other property, are usually made the subject of special stipulations.

(*t*) *Dare v. Tucker*, 6 Ves. 460;
Cooper v. Emery, 1 Phill. 388.

(*u*) *Dare v. Tucker*, 6 Ves. 460;
Boughton v. Jewell, 15 Ves. 176;
Berry v. Young, 2 Esp. 640.

(*t*) 37 & 38 Vict. c. 78, s. 2, r. 4.

(*u*) *Berry v. Young*, 2 Esp.

640.

(*x*) Sugd. V. & P. 11th ed. 458,
and 14th ed. 452.

Prior to the Vendor and Purchaser Act, 1874, if the vendor retained any property to which the deeds related, he usually stipulated for their retention, even though the portion of the property sold were of greater value than the unsold portion, though this is of course now unnecessary; but in such a case it would only be reasonable for the contract to provide that in the event of the vendor selling the property retained, the original purchaser should be entitled to have the deeds delivered to him on his acknowledging the right of the subsequent purchaser to their production, such acknowledgment to be prepared at the expense of such subsequent purchaser; and the contract should stipulate with the subsequent purchaser to that effect, though it is assumed that in the absence of such a stipulation, the subsequent purchaser would not now be entitled to the deeds, as it was formerly supposed he might have been (y).

Should the whole of the property be put up for sale by auction in more than one lot, it is usual for the vendor to stipulate for the retention of the deeds, in case the whole of the property should not be sold, until the sale thereof, and to agree to produce them whilst so remaining in his possession, but not to give an acknowledgment of right to their production; and further to provide that when the entirety of the property is sold the title deeds should be delivered to the purchaser whose purchase-money is largest in amount, and who is to acknowledge the right of the other purchasers to

(y) Sugd. V. & P. 11th ed. 456.

their production, such acknowledgment to be prepared at the expense of the party whose right is acknowledged, and perused and executed at the expense of the person making the acknowledgment.

The contract frequently provided for determining the covenant on delivery of the deeds to a future purchaser, on such purchaser entering into a covenant for their production; and where the vendor was not beneficially interested in the estate, it is usual for the contract to restrict the operation of the covenant, so far as it was personal, to such period as the deeds remained in the actual custody of the covenantor or his representative, but to extend it to the deeds themselves into whosoever custody the same may be delivered. These provisions are now unnecessary, as the Conveyancing and Law of Property Act, 1881, s. 9, sub-s. 112, confines the liability to the production of deeds under the acknowledgment there provided for to each individual possessor or person so long only as he has possession or control of the documents, the right to the production of which is acknowledged.

Should the purchase be completed without an acknowledgment being given for production, the purchaser is nevertheless entitled in equity to have the deeds produced to him (z), and the inability of the vendor to furnish the purchaser with a legal acknowledgment for production and furnishing copies of documents of title will not be an objection to title in case the purchaser

(z) *Fain v. Eyre*, 2 Sim. & Stu. 533.

will, on completion of the contract, have an equitable right to production of such documents (*a*).

A vendor, having entered into a covenant for production of deeds to a former purchaser, is not justified in refusing to deliver the deeds to the second purchaser if he will allow notice of the covenant to be placed upon his conveyance, and will covenant to perform the prior covenant or acknowledgment, or acknowledge the right of the first purchaser to production in case the vendor's first covenant or acknowledgment was made determinable upon his procuring a substituted covenant (*b*) ; if, therefore, in the face of this, the vendor is desirous of retaining the deeds the contract should stipulate accordingly.

If the contract does not provide for the custody of the deeds on a sale in lots, the purchaser whose purchase-money is largest in amount will be entitled to them.

If the contract provides that the title deeds are to be delivered to the purchaser of the largest lot, the purchaser of the largest lot in value and extent would be entitled to them in preference to a purchaser of several lots in value and extent exceeding that of the largest lot (*c*) ; and a provision making the purchaser of the largest lot entitled to the deeds, will entitle the purchaser of the largest lot in superficial area to them (*d*).

The expense of examining the abstract with the deeds

(*a*) 37 & 38 Vict. s. 2, r. 3.

110.

(*b*) Sugd. V. & P. 435.

(*d*) *Griffiths v. Hatchard*, 1 K.

(*c*) *Scott v. Jackman*, 21 Beav.

& J. 17.

and muniments of title, wherever they may be, and of all journeys for that purpose are now by the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 6, thrown upon the purchaser.

In the absence of stipulation to the contrary, the vendor must produce for examination with the abstract all documents of title, except instruments on record, whether in his possession or not, and although he may only have a covenant for their production (*e*). The following are the provisions contained in section 9 of the Conveyancing and Law of Property Act, 1881, relating to the production and safe custody of title deeds.

“9.—(1) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

“(2) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to

(*e*) Sugd. Con. V. & P. 319.

time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

“(3) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

“(4) The obligations imposed under this section by an acknowledgement are—

“(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorized in writing; and

“(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

“(iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

“(5) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

“(6) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

“(7) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the Court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

“(8) An acknowledgment shall by virtue of this act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

“(9) Where a person retains possession of documents and gives to another an undertaking in writing for safe custody thereof, that undertaking shall impose on

the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

“(10) Any person claiming to be entitled to the benefit of such an undertaking may apply to the Court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the Court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

“(11) An undertaking for safe custody of documents shall by virtue of this act satisfy any liability to give a covenant for safe custody of documents.

“(12) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

“(13) This section applies only if and as far as a
s. s

contrary intention is not expressed in the acknowledgment or undertaking.

"(14) This section applies only to an acknowledgment or undertaking given or a liability respecting documents incurred after the commencement of this act."

SECTION 9.

Identity.

It is frequently necessary to provide by the contract that the purchaser shall admit the identity of the parcels of the estate sold, upon the evidence afforded by comparison of the description in the contract and the muniments, and that further evidence of identity shall not be called for, in the absence of which a purchaser is entitled to be furnished with satisfactory evidence of identity of the parcels; but such a provision, unless framed to meet the particular discrepancy, will not relieve the vendor from pointing out the entire property proposed to be sold (*f*), or preclude a purchaser from requiring evidence of identity if the descriptions of the parcels in the contract vary from those in the abstracted documents (*g*). And where it was provided that the purchaser should not require any further proof of identity than was furnished by the title deeds, it was

(*f*) *Robinson v. Musgrove*, 2 Moo. & R. 92.

(*g*) *Flower v. Hartopp*, 6 Beav. 476.

held that a good title was not made under the contract, inasmuch as the contract was, in effect, that the deeds should show identity, and no identity was in fact shown (*h*).

So far as regards copyholds, if it can be shown that the property has been held under the descriptions thereof on the court rolls, mere vagueness in such description will be unimportant (*i*).

In order to prevent the right of a purchaser to vacate the sale in the event of any misdescription of the estate attaching, it is usual to provide, that if any error or mistake shall appear in the description of the property, or in the nature or quality of the vendor's interest therein, or any other error shall appear in respect thereof, such error or mistake shall not annul the sale, but a compensation shall be given or taken, as the case may require. Upon a sale of lands of different tenures, or copyholds held of different manors, it is usual to stipulate that the vendor shall not be required to distinguish the particular lands held under each tenure or manor, and in the absence of such a stipulation it would appear that the lands of each tenure or manor would have to be identified (*k*).

(*h*) *Curling v. Austin*, 2 D. G. & Sm. 129.

(*i*) *Long v. Collier*, 4 Russ. 267.

(*k*) *Monro v. Taylor*, 8 Hare, 66; *Dawson v. Brinckman*, 3 Mac. & G. 53; *Cross v. Lawrence*, 9 Hare, 462.

SECTION 10.

Recitals—Easements—Non-Registration.

It is usual to provide, that all recitals and statements of matters of fact or conclusions of law contained in any abstracted deed or document dated twenty years prior to the day of sale, shall be accepted as conclusive evidence of the truth and correctness of such matters and conclusions. In the absence of this stipulation, a mere provision that recitals should be evidence would not bind the purchaser to accept recitals as evidence of conclusions of law (*l*).

The Vendor and Purchaser Act, 1874, provides that recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments, acts of parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions (*m*). And it has recently been held under this rule that a recital in a conveyance more than twenty years old that the vendor was seised in fee is sufficient evidence of that fact, and no prior abstract of title can be required, nor need a forty years' title be furnished (*n*).

The Conveyancing and Law of Property Act, 1881,

(*l*) Jarm. Con. by S. 4.

(*n*) *Bolton v. London School*

(*m*) 37 & 38 Vict. c. 78, s. 2, *Board*, 7 L. R., Ch. D. 766.

s. 3, subs. 6, provides that a purchaser shall assume, unless the contrary appears, that the recitals contained in any abstracted instruments of any deed, will, or other document forming part of that prior title are correct and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected if and as required by fine, recovery, acknowledgment, enrolment, or otherwise.

A statement that the property is sold subject to all rights of way and water and other easements (if any) existing over or upon the same, is frequently inserted in the contract; and in such case the vendor is entitled to have these restrictive words inserted in the habendum of the conveyance or assignment (*o*). If the property is stated in the contract to be free from land tax or tithe, and the vendor has no proof in support of such statement in his possession, it is usual to provide that no inquiry shall be made on the point, as in the absence of such a stipulation the vendor would be bound to produce evidence in support of his statement, and upon a sale of enfranchised copyholds the minerals and other rights reserved to the lord by the Copyhold Acts should be excepted from the sale (*p*).

If the estate is situate in a register county, it is usual to provide that no objection shall be taken on account of the non-registration of any document of title (if any) not registered, and to stipulate that the expense of

(*o*) *Gale v. Squier*, 5 L. R., 1 Ch. D. 625.

(*p*) *Upperton v. Nicholson*, 6 L. R., Ch. 436.

registering such document, if the purchaser require it registered, shall be borne by him, and that the expense of stamping deeds (if any) unstamped or insufficiently stamped, which a purchaser shall require to be stamped, shall also be borne by him. It is assumed, however, it should not be provided that a document unstamped or insufficiently stamped shall not be stamped, as such a provision might be held to be a contract prejudicial to the revenue, and as such not enforceable (*p*).

SECTION 11.

Outstanding Estate—Covenants—Allotments, &c.

The contract frequently provides that every assurance and act which may be required by the purchaser for getting in, surrendering or releasing any outstanding estate, or for completing the vendor's title, shall be prepared at the expense of the purchaser.

In the absence of such a stipulation, outstanding estates and incumbrances must be got in at the vendor's expense, by deeds distinct from the conveyance; or the purchaser may require the vendor to bear the increased expense of the purchase deed by reason of the concurrence of trustees and incumbrancers therein (*q*). But such expense would not be thrown upon the vendor if the incumbrances be kept on foot for the purchaser's protection (*r*).

(*p*) *Smith v. Mawhood*, 14 M. & W. 452; *Nixon v. Albion Marine Insurance Co.*, 2 L. R., Ex. 338. See also *Whiting and Loomes*, 14 L. R., Ch. D. 822.
 (*q*) *Reeves v. Gill*, 1 Beav. 375.
 (*r*) *Dart, V. & P.* 504; *Cooper v. Cartwright*, Johns, 679.

In a case where, after contract signed, the vendor died, having devised the legal estate to an infant, it was held that his estate must bear the expense of a suit thus rendered necessary, but it was otherwise if he died intestate, leaving an infant heir (*s*). The Conveyancing and Law of Property Act, 1881, s. 4, sub-s. 1, provides as to persons dying after the 31st December, 1881, that where, upon the death of any person, there is subsisting a contract enforceable against his heir or devisee for sale of a fee simple or freehold interest descendible to his heirs general in any land, his personal representatives shall have power to convey such land for all the estate and interest vested in him at his death in any manner proper for giving effect to the contract.

It is also usual to provide that it shall be assumed that every owner of the property included in the contract, whose widow (if any) would have been entitled to dower, and is not mentioned in the title, did not leave a widow.

In sales by fiduciary vendors, it is not unusual to insert a special condition that the vendors will covenant only against incumbrances (*t*); though the absence of such a condition would not, it is assumed, render such vendors liable to enter into any other covenants.

When property subject to a lease at an entire rent is sold in lots, or a portion thereof only is sold, provision should be made by the contract for the apportionment

(*s*) *Purser v. Darby*, 4 Kay & Jur. 480.
J. 41; *Barker v. Venables*, 11 (*t*) Dart, V. & P. 172.

of the rent, and if the tenant's concurrence in the apportionment cannot be obtained, the purchaser should be precluded from taking any objection on that account (u).

If a deed has been executed, or a surrender of copyholds made, by attorney, the power must be produced, and it must be shown that the principal was alive when it was acted upon; and where the power is not given for a valuable consideration it should be shown that it was not revoked prior to its apparent exercise (v); but as to acts made and done since the 31st December, 1881, under powers of attorney, it is provided by section 47 of the Conveyancing and Law of Property Act, 1881, that "Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same."

When the property sold consists of an allotment under an inclosure award, or an allotment taken in exchange, it is usual to stipulate that the purchaser shall not be entitled to call for production of the title to the property in respect of which the allotment was made.

(u) Prid. Con., tit. "Conditions of Sale."
(v) Dart, V. & P. 311.

In the case of enfranchised copyholds it was usual to provide that the purchaser should not call for production of the manorial title unless the enfranchisement had been effected under the copyhold acts (*w*), but now the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 2, provides that where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold the purchaser shall not call for the title to make the enfranchisement.

Should a trust deed for the benefit of creditors, registered under the bankruptcy acts, be on the title, it is usual to provide by the contract that the vendor shall not be required to furnish any evidence beyond the certificate of registration, of the validity of such deed.

SECTION 12.

Leaseholds.

Until recently, if it were requisite to negative a purchaser's right on a sale of leaseholds to call for the lessor's title as well as the title to the lease, the contract should have stipulated accordingly (*x*); but a condition that the vendor should not be required to produce the lessor's title, did not prevent the purchaser from himself investigating it, and objecting on the ground of defects which he might so discover (*y*).

(*w*) *Kerr v. Pawson*, 25 Beav. 394.

(*x*) *Hume v. Bentley*, 5 De G. & Sm. 520.

(*y*) *Shepherd v. Keatley*, 3 L. J. (N. S.) Ex. 288; see also *Waddell v. Wolfe*, 9 Q. B. 515.

On a sale by auction of leaseholds it is usual to state upon the particulars and conditions that the lease will be produced at the sale and that it may be inspected previously, and stipulate that the purchaser shall be deemed to purchase with full notice of its contents and the condition of the premises as regards repairs and all other matters, and in the absence of such a stipulation a purchaser would still be deemed to have notice; but the contract must not contain misrepresentations or omissions (*y*). It is also usual to stipulate in a contract for sale of leaseholds, that the production of the receipt for the last payment of rent accrued under the lease previously to the date fixed for completion shall be accepted as conclusive evidence of all the covenants and conditions in the lease having been performed up to the time of completion, or that breaches (if any) have been waived.

And if, as is very frequently the case, the person to whom the rent is paid is not the person who granted the lease, then that the person giving such receipt shall be deemed to be the person entitled to the reserved rent without evidence other than the receipt of the devolution of the property.

The Conveyancing and Law of Property Act, 1881, s. 3, sub-ss. 4 and 5, provides that, on production of a receipt for the last payment of rent due before completion of the purchase, it shall be assumed, unless the contrary appears, that all the covenants and provisions under the lease or underlease sold have been

(*y*) *Weston v. Savage*, 10 L. R., Ch. D. 736; *Jones v. Rimmer*, ib. 14, 588.

observed and performed up to the date of completion of the purchase.

Upon a sale of renewable leaseholds it may be necessary to negative the right of the purchaser to call for any of the leases prior in date to the subsisting lease.

The Vendor and Purchaser Act, 1874 (z), provides that, under a contract to grant or assign a term of years, which is derived or to be derived out of a freehold or leasehold estate, the intended lessee or assignee shall not be entitled to call for the title to the freehold, and, as to sales made after the 31st December, 1881, the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 5, provides that where land sold is held by an underlease, the purchaser shall assume, unless the contrary appear, that the underlease and every superior lease were duly granted; but notwithstanding these provisions it is assumed that on a sale of leaseholds the purchaser's right to call for the lessor's title should be negatived, as it does not appear that there is anything to prevent the purchaser investigating and objecting to defects which he may discover.

Upon a sale in lots of leaseholds held under the same lease, the rent and liabilities under such lease should be apportioned. With this object, underleases, with covenants of mutual indemnity, are frequently resorted to, the vendor or one of the purchasers retaining the original term (a).

(z) 37 & 38 Vict. c. 68, s. 7,
r. 1.

(a) See *Camberwell and South
London Building Society v. Hollo-
way*, 13 L. R., Ch. D. 754.

SECTION 13.

Sales by Auction.

As to sales by auction, it should be remarked that the particulars and conditions cannot be verbally varied at the time of sale (*y*), even though the purchaser may have agreed in writing to abide by the conditions and declarations made at the sale (*z*); but if it clearly appears that a purchaser heard and understood the effect of the verbal declaration, he would probably not obtain a decree for specific performance without such variations, if they were prejudicial to him (*a*); nor could he, on the other hand, enforce specific performance with the variations, supposing them to be in his favour (*b*); but personal information given to a purchaser may be given in evidence by either vendor or purchaser as a defence against a specific performance (*c*).

On a sale by auction the conditions usually state that the highest bidder shall be the purchaser (unless the sale is by the direction of the court), and stipulate that not less than a specified sum shall be advanced at each bidding, and that no bidding shall be retracted.

In the absence of a condition against a bidding being retracted a bidder may, before the fall of the hammer,

(*y*) *Higginson v. Clowes*, 15 Ves. 516.

(*z*) *Gunnis v. Erhart*, 1 H. Bl. 289; *Powell v. Edmunds*, 12 East, 6; *Torrance v. Bolton*, 8 L. R., Ch. 118.

(*a*) *Ogilvie v. Foljambe*, 3 Mer. 53; *Woodward v. Miller*, 2 Coll. 279.

(*b*) *Dart*, V. & P. 111.

(*c*) *Ogilvie v. Foljambe*, 3 Mer. 65; *Clowes v. Higginson*, 1 V. & B. 524.

retract his bidding (*d*), and it would even seem doubtful whether a purchaser's right in this respect is negatived by such a condition (*e*).

At the time of the passing of the Act for amending the Law of Auctions of Estates (*f*), if property were put up for sale without reserve, the sale was vitiated by a person being employed by the vendor to bid; but in the absence of such a statement the employment of a bidder to prevent the property being sold at an under-value seemed generally allowable in equity (*g*); though in a recent case (*h*) Lord Cranworth expressed a doubt whether, in the absence of express stipulation, a vendor might employ a bidder.

The law upon the subject is now defined by the act just referred to, which enacts that whenever a sale by auction of land would be void at law by reason of employment of a puffer, the same shall be deemed invalid in equity as well as at law (*i*).

And after reciting that as sales of land by auction were then conducted, many of such sales were illegal and could not be enforced against an unwilling purchaser, and that it was expedient for the safety of both seller and purchaser that such sales should be so conducted as to be binding on both, enacts that the parti-

(*d*) *Payne v. Cave*, T. R. 148; *Routledge v. Grant*, 4 Bing. 653.

(*e*) Sugd. V. & P. 14; see, however, *Freer v. Rimmer*, 14 Sim. 391.

(*f*) 30 & 31 Vict. c. 48.

(*g*) *Thornett v. Hains*, 15 M. & W. 372; *Meadows v. Tanner*, 5 Madd. 34.

(*h*) *Mortimer v. Bell*, 1 L. R., Ch. Ap. 10.

(*i*) 30 & 31 Vict. c. 48, s. 4.

culars or conditions of sale by auction of any land shall state whether such land will be sold without reserve or subject to a reserved price, or whether a right to bid is reserved; if it is stated such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person (*k*). But in a case where an estate was sold by the court, with liberty for all parties to bid, and the sale was stated by the auctioneer to be without reserve, though the parties were at liberty to bid, the mere fact of the plaintiff in the suit having run the purchaser up to a considerable sum without any other bidder intervening, was not itself held sufficient ground to discharge the purchaser (*l*).

And where any sale by auction of land is declared, either in the particulars or conditions of such sale, to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think proper (*m*). But if the conditions state that the sale is subject to a reserved price, a person must not be employed to bid up to the reserved price, unless the right to do so is stipulated for (*n*).

Where sales by auction took place by direction of the court previously to the Act to amend the Law of Auc-

(*k*) 30 & 31 Vict. c. 48, s. 5.

(*m*) 30 & 31 Vict. c. 48, s. 6.

(*l*) *Dimmock v. Hallett*, 2 L. R.,
Ch. 21,

(*n*) *Gilliatt v. Gilliatt*, 9 L. R.,
Eq. 60.

tions, a purchaser was not certain of his bargain until the certificate of the chief clerk became binding, as it was the practice, in certain events, before such certificate became binding, to re-open the biddings; but now the act just referred to, after reciting that it was the long-settled practice of courts of equity, in sales of land by auction under their authority, to open biddings even more than once, and much inconvenience had arisen from such practice, and it was expedient that courts of equity should no longer have the power to open biddings after sales by auction under their authority, it was further enacted, that the practice of opening biddings on any sale by auction of land under or by virtue of any order of the Court of Chancery, should from and after the time appointed for the commencement of the act (1st of August, 1867) be discontinued; and the highest *bond fide* bidder at such sale, provided he should have bid a sum equal to or higher than the reserved price (if any), should be declared and allowed the purchaser, unless the court or judge should, on the ground of fraud or improper conduct in the management of the sale, upon the application of any person interested in the land (such application to be made to the court or judge before the chief clerk's certificate and the result of the sale should have become binding), either open the biddings, holding such bidder bound by his bidding, or discharge him from being the purchaser, and order the land to be resold upon such terms, as to

costs or otherwise, as the court or a judge should think fit (o).



SECTION 14.

Beneficial Occupation by Purchaser before Completion.

Should the purchaser be let into possession of the property before completion of the purchase, or be in the occupation thereof at the time of the contract being entered into, the position of the vendor and purchaser, as regards payment of rent or compensation for use and occupation, should be defined.

In the absence of stipulation to the contrary, the beneficial occupation of the property agreed to be sold by the purchaser will not render him liable for use and occupation pending discussion, if the contract is not completed by reason of the title being defective (p), though a purchaser in such an event has been held to be entitled to recover compensation for use and occupation from a tenant whom he let into possession (q).

A tenancy at will is determined by a contract for sale from the time at which possession is agreed to be given to the purchaser (r), but a tenancy from year to year,

(o) 30 & 31 Vict. c. 48, s. 7.

Delves v. Delves, 20 L. R., Eq.

77.

(p) *Winterbotham v. Ingham*, 7 Q. B. 611.

(q) *Doe v. Mills*, 4 Nev. & M.

25.

(r) Dart, V. & P. 205; Sugd.

V. & P. 178.

or for a longer period, will not be determined by a contract with the tenant for sale to him unless such contract be absolute for purchase, whether the vendor has a good title or not (s).

(s) *Doe v. Stanion*, 1 Mee. & Wels. 695; *Tarte v. Darby*, 15 Mee. & Wels. 601.

CHAPTER VII.
EFFECT OF CONTRACT ON RIGHTS OF
CONTRACTING PARTIES.

SECTION 1.

Rights of Contracting Parties.

UPON a valid contract for sale and purchase being entered into, equity will consider the vendor a trustee of the estate sold for the purchaser thereof (*a*), and the purchaser a trustee of the purchase-money for the vendor (*b*).

A purchaser, therefore (who has performed his contract up to the time of the event happening) (*c*), is entitled to the benefit of any improvements to the property or beneficial circumstance which may arise after the date of the contract and before the conveyance to him (*d*), even though such benefits may have arisen through the expenditure of the vendor (*e*). On the

(*a*) *Atcherley v. Vernon*, 10 Mod. 518; *Davie v. Beardsham*, 1 Cha. Ca. 39; *Green v. Smith*, 1 Atk. 572.

(*b*) *Pollexfen v. Moore*, 3 Atk. 272.

(*c*) *Counter v. M'Pherson*, 5 Moore, 83.

(*d*) *Hooper v. Purrier*, 1 Madd. 539; *Mortimer v. Capper*, 1 Bro. C. C. 156; *Jackson v. Lever*, 3 Bro. C. C. 60.

(*e*) *Monro v. Taylor*, 8 Hare, 60; *Clare Hall v. Harding*, 6 Hare, 296; *Dart, V. & P.* 248.

other hand, if the vendor has performed his contract (up to the time of the happening of the event), any loss or deterioration of the property, after the date of the contract and before the conveyance, arising, without the fault of the vendor, will fall upon the purchaser (*f*)—such as destruction of buildings by fire—even though the vendor allow the insurance to expire without giving notice to the purchaser (*g*).

It follows that a purchaser should, immediately upon entering into the contract, ascertain whether the property is insured and for what period, and if uninsured, or the insurance is likely to expire before completion, to at once effect an insurance. And it is assumed that, since the Act to amend the Law of Auctions of Estates (*h*), it would not be safe for a purchaser to delay the insurance of property sold by the direction of the court until the chief clerk's certificate has become binding, though this formerly he might safely have done, as he was not then considered the purchaser until the chief clerk's certificate had become binding, and was not liable for loss by fire or otherwise to the estate in the interim (*i*).

A vendor is entitled to a lien on the property for the unpaid purchase-money, similar in its incidents to that of an ordinary equitable mortgagee (*k*). And it would

(*f*) *Pools v. Shergold*, 2 Bro. Beav. 260.
 C. C. 118; *Kenny v. Wrexham*, 6 (h) 30 & 31 Vict. c. 48.
 Madd. 355. (i) *Ex parte Minor*, 11 Ves.
 (g) *Paine v. Miller*, 6 Ves. jun. 559.
 349; *Robertson v. Skelton*, 12 (k) *Crockford v. Alexander*, 15

seem that a vendor might retain an estate contracted to be sold and the whole or such part of the purchase-money which might have been paid in the event of a purchaser dying intestate, without an heir, before conveyance (o).



SECTION 2.

Bankruptcy or Lunacy of Contracting Parties.

Bankruptcy or lunacy of either vendor or purchaser will not avoid the contract (p).

"The Bankruptcy Act, 1869" (q), provides that when any property of the bankrupt, acquired by the trustee under that act, consists of unprofitable contracts, &c., the trustee, notwithstanding he has endeavoured to sell or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand, disclaim such property; and upon the execution of such disclaimer the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication (r).

The trustee is not to be entitled to disclaim any property in pursuance of the act in cases where an applica-

Ves. 138; *Humphreys v. Harrison*,
1 Jac. & W. 581; *Hippesley v.*
Spencer, 5 Madd. 422; *King v.*
Smith, 5 Hare, 239.

(o) Sugd. V. & P. 295.

(p) *Whitworth v. Davis*, 1 Ves.

& B. 545; *Owen v. Davies*, 1 Ves.
82; *Winged v. Lefebury*, 2 Eq.
Ca. Abr. 32; *Brook v. Hewitt*, 3
Ves. 255.

(q) 32 & 33 Vict. c. 71.

(r) *Ib.* s. 23.

tion in writing has been made to him by any person interested in such property requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the court, declined or neglected to give notice whether he disclaims the same or not (s). The Bankruptcy Act, 1883, s. 55, sub-ss. 1 and 4, contains similar provisions to the foregoing.



SECTION 3.

Death of Contracting Parties.

The death of either party will not avoid the contract. If the vendor dies before completion, his executors will be entitled to the purchase-money. And if the purchaser dies before completion, his heir or devisee will be entitled to the estate if the contract was one which could be enforced against an unwilling purchaser (t). And formerly such heir or devisee would have been entitled to require the purchase-money to be paid out of the personal estate of the purchaser; but now the heir or devisee will simply take the estate subject to and charged with the purchase-money remaining unpaid, it being provided (u) that when any person shall, after the 31st December, 1854, die seised of or entitled to any estate or interest in any land or other

(s) *Id.* s. 24.

333.

(t) *Brooms v. Monck*, 10 Ves.

(u) 17 & 18 Vict. c. 113.

597; *Garnett v. Acton*, 28 Beav.

hereditaments, which shall, at the time of his death, be charged with the payment of any sum or sums of money, by way of mortgage,—which word mortgage is, by a subsequent Act of Parliament (*v*), to be deemed to extend to any lien for unpaid purchase-money upon any lands and hereditaments purchased by a testator, or, as has since been held, by an intestate (*w*),—and such person shall not by his will or deed, or other document, have signified any contrary or other intention, the heir or devisee, to whom such land or hereditaments shall descend or be devised, shall not be entitled to have the mortgage debt discharged out of the personal estate or any other real estate of such person, but the lands and hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged; every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof, provided that nothing therein contained shall affect or diminish any right of the mortgagee to obtain full payment of his mortgage debt out of the personal estate of the person so dying as aforesaid or otherwise.

It was held upon the construction of this act (*x*), that it did not apply to leaseholds (*y*); but now it is pro-

(*v*) 30 & 31 Vict. c. 69.

(*x*) 17 & 18 Vict. c. 113.

(*w*) *Harding v. Harding*, Law Rep., 13 Eq. 493.

(*y*) *Solomon v. Solomon*, 33 L. J., Ch. 473.

vided (z) that it shall extend to lands or hereditaments of any tenure.

A general devise contained in a will made since the passing of the Wills Act, will pass land contracted to be purchased after the date of the will, and a contract for sale will revoke a prior devise made by a vendor (a).

SECTION 4.

Stamp on Contract.

If the subject-matter of the contract is of the value of £5 or upwards, and under hand only, the agreement is liable to a stamp duty of 6d. (b). If the agreement is under seal, it cannot be received in evidence unless stamped as a deed (c).

Agreements liable to sixpenny stamps must be stamped within fourteen days after being signed. After that time they can be stamped on payment of a penalty of £10. The enactment reducing the penalty where the value is under £20 has been repealed.

A purchaser of several lots at an auction must pay stamp duty in respect of each lot of the value of £5 or upwards, as a separate agreement in respect of each lot is considered to be entered into (d).

(z) 40 & 41 Vict. c. 34.

(a) *In re London Bridge Approaches Act*, 13 Sim. 569; *Furrer v. Earl Winterton*, 5 Beav. 1.

(b) 33 & 34 Vict. c. 97.

(c) *Robinson v. Dryborough*, 6 T. R. 317.

(d) *Watling v. Horwood*, 12 Jur. 48; *James v. Shore*, 1 Stark. N. P. C. 426.

PART III.

MATTERS BETWEEN CONTRACT AND COMPLETION OF PURCHASE.



CHAPTER VIII. DELIVERY OF ABSTRACT.



SECTION 1.

As to perfecting Title.

It is not absolutely necessary that the title of the vendor should be perfect at the time the contract is entered into, provided he is able to perfect it before completion; and specific performance has been decreed at the instance of vendors having an imperfect title, who contracted under the *bonâ fide* belief that they could make a good title at the time fixed for completion, and which they eventually became in a position to do (a). A vendor, having filed a bill for specific performance, can enforce the contract though the title

(a) *Hoggart v. Scott*, 1 Russ. & M. 293; *Eyston & Simonds*, 1 Y. & C. C. C. 208; *Wynn v. Morgan*, 7 Ves. 202; *Coffin v. Cooper*, 14 Ves. 205; *Mortlock v. Buller*, 10 Ves. 315; *Boehm v. Wood*, 1 Jac. & W. 421.

may have been imperfect at the time the contract was entered into, if it is perfected before the chief clerk's certificate, unless time has been made the essence of the contract, or there has been unreasonable delay (*b*). But if the vendor enters into the contract with the knowledge that he has no right to sell, equity will not thus assist him (*c*).

A purchaser, however, discovering the defect of title, may vacate the contract if he does so immediately, and does not act as if he considered it subsisting (*d*); though in a case where trustees, with power to sell with the consent of the tenant for life, entered into a contract and filed a bill for specific performance, but did not procure the requisite consent, it was doubted whether the bill should not be dismissed, although the defendant did not raise the objection (*e*).

It therefore follows that upon the contract being entered into, if the vendor's title is incomplete, he should at once proceed to perfect it, and to deliver as complete and perfect an abstract to the purchaser as he is able to furnish at the time of such delivery, taking care to deliver such abstract within the time fixed by the contract, should any time be named.

Should the abstract not be delivered within the

(*b*) *Wynn v. Morgan*, 7 Ves. 202; *Mortlock v. Buller*, 10 Ves. 315.

(*c*) *Chamberlain v. Lee*, 10 Sim. 450.

(*d*) *Hoggart v. Scott*, 1 Russ. & M. 293; *Eyston v. Simonds*, 1 Y. & C. C. C. 608; *Salisbury v. Hatcher*, 2 Y. & C. C. C. 65.

(*e*) *Adams v. Brooke*, 1 Y. & C. C. C. 627.

time stipulated for its delivery, or if no time has been named by the contract, and the abstract is not delivered within a reasonable time before the day fixed for completion, if it is the intention of the purchaser to avoid the contract on this ground, the solicitor should object to receive, or at once return it (*f*).

SECTION 2.

Abstract when considered perfect.

An abstract will be considered perfect when it appears therefrom that the vendor can himself convey or procure a conveyance of the legal and equitable estate, free from incumbrances, to be made to the purchaser (*g*). The title also will be considered perfect when it appears that the vendor will be in a position at the time fixed for completion to acquire an indisputable right to the legal and equitable estates (*h*).

The abstract will be considered imperfect if the concurrence of incumbrancers, or of any third party whose consent is necessary, cannot be insisted on (*i*).

(*f*) Dart, V. & P. 305.

(*g*) *Lord Braybrook v. Inskip*, 8 Ves. 436; *Boehm v. Wood*, 1 Jac. & W. 419; *Jumpson v. Pitcher*, 1 Coll. 13; *Townsend v. Champenown*, 1 Y. & J. 449; *Sellick v. Trevor*, 11 Mee. & W. 728; *Avarne v. Brown*, 14 Sim. 303;

Savory v. Underwood, 23 Law T. R. 141.

(*h*) *Cattell v. Corral*, 4 Y. & C. 228.

(*i*) *Lowin v. Guest*, 1 Russ. 325; *Sidebotham v. Barrington*, 3 Beav. 528.

The abstract when delivered will become the property of the purchaser on the purchase being completed; and he will be entitled to retain it until the purchase is vacated by consent, or is declared impracticable by a court of equity (*k*), in which case the abstract is to be returned, and no copy kept by the purchaser, lest it be kept for a mischievous purpose; and although the purchaser pays for the opinion, that ought, it should seem for the same reason, to be returned with the abstract (*l*).

The Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 7, provides that on a sale of any property in lots, a purchaser of two or more lots held wholly or partly under the same title shall not have a right to more than one abstract of the common title except at his own expense.

(*k*) *Roberts v. Wyatt*, 2 Taunt. 268.

(*l*) Sugd. V. & P. 11th ed. 447.

CHAPTER IX.
PERUSAL AND EXAMINATION OF
ABSTRACT.

SECTION 1.

Perusal of Abstract.

UPON the receipt of the abstract the purchaser's solicitor will proceed to investigate the vendor's title, and should commence by perusing the abstract and making himself thoroughly acquainted with the title thereby disclosed, after which the abstract should be compared with the muniments.

In cases where the abstract is laid before counsel for his opinion upon the title, the examination is frequently deferred until the opinion has been obtained; but this, it is considered, is scarcely advisable, for if the documents should not be properly abstracted, or clerical errors should occur in the abstract, counsel's attention may probably be carried from the thread of the title to direct the correction of some apparent inaccuracy, or to inquire whether such and such documents are fully abstracted, all which may be avoided by a careful comparison of the abstract with the muniments of title.

And where a binding contract has been entered into, and the purchaser's solicitor compares the abstract with the deeds before further investigating the title, the vendor must pay the costs if the title prove bad (a).

SECTION 2.

Examination of Muniments.

Upon the muniments of title being produced for examination, as to such of them as are liable to stamp duty, the purchaser's solicitor usually directs his attention in the first instance to the stamps, to ascertain that the proper duties have been impressed.

It should be seen that deeds are executed by all necessary persons who are parties thereto, and, if executed in the exercise of a power, that the formalities directed to be observed in the exercise thereof have been complied with.

As to wills dated prior to the Wills Act coming into operation, if the estate, the title to which is being examined, is of freehold tenure, it should be seen that the will was executed in the presence of three disinterested witnesses, and it should not be presumed, because a probate may be produced, that all due formalities as to the execution of the will have been observed; but it

(a) *Hodges v. Earl of Lichfield*, 1 Bing. N. C. 499.

should be borne in mind that the formalities which at that time would entitle a will to probate, would not (as now) be effectual to a valid devise of estates of inheritance.

In cases where settlements are executed after marriage in pursuance of articles made previously thereto, the articles should be produced in order that it may be ascertained that the settlement is in accordance with the articles.

The entirety of every document should be carefully perused to ascertain that all portions thereof material to the title have been put upon the abstract.

When money forms the consideration, or a portion of the consideration, for the execution of any document of title, it should be seen that a receipt or receipts is or are indorsed and signed by the proper party or parties; but as to deeds executed after the 31st of December, 1881, the Conveyancing and Law of Property Act, 1881, ss. 54 and 55, provide that a receipt for the consideration in the body of a deed shall be a sufficient discharge without any further receipt being indorsed; and a receipt for the consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the consideration was not in fact paid or given, be sufficient evidence of the payment or giving thereof. The documents should be carefully searched for exceptions in the operative part thereof, or the covenants therein, which may lead to the disclosure of any lease, incumbrance, or other circum-

stance not shown upon the abstract. The documents should also be carefully inspected to ascertain if any memoranda or other matter is indorsed thereon which may put the purchaser's solicitor upon inquiry as to matters connected with the title not otherwise disclosed.

When property has been conveyed by means of feoffment, it should be seen that a memorandum of livery of seisin, in pursuance of the deed, is indorsed; though livery of seisin will be presumed after twenty years' consistent possession (*b*).

When a conveyance is made by lease and release, if the lease is not produced it should be seen that it is recited or referred to in the release, so as to come within the operation of 4 & 5 Vict. c. 21.

The act of 4 & 5 Vict. c. 21, as its title expresses, was passed for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties; and provides that releases of freehold estates, which should be expressed to be made in pursuance of the act, should be as effectual as if the releasing party or parties had also executed in due form a bargain and sale, or lease for a year, for giving effect to such release, although no such bargain and sale, or lease for a year, should be executed. It should, therefore, be seen that conveyances made in reliance upon this act are expressed to be made in pursuance thereof.

(*b*) *Rees v. Lloyd, Wright*, 123. regard to the Real Property
This would doubtless now be re- Limitation Act, 1874 (37 & 38
duced to twelve years, having Vict. c. 57).

The stamp duty payable in respect of the lease for a year was abolished by the 13 & 14 Vict. c. 57, but all conveyances executed upon or before the 10th of October, 1850, unless preceded by a lease for a year, should bear the same duty as the lease for a year was subject to, in addition to the *ad valorem* duty then payable.

Copies or tracings of maps or plans upon the documents of title usually accompany the abstract, or are furnished by the vendor to the purchaser upon request free of expense, and such copies should be compared with the documents from which they are taken (c).

If the estate is in a register county, or a document of title is subject to any act of parliament directing the inrolment thereof, it should be seen that memorandums or certificates of registration or inrolment are endorsed upon such document.

(c) As to whether the abstract should contain copies of plans or a mere reference to them, see *Blackburn v. Smith*, 2 Exch. 792.

CHAPTER X.
REQUISITIONS UPON AND OBJECTIONS
TO TITLE.

SECTION 1.

Delivery of Requisitions.

AFTER perusing the abstract of the vendor's title and comparing it with the deeds, the purchaser's solicitor will be in a position to prepare his requisitions upon and objections to the title disclosed by the abstract; in the preparation whereof regard must be had to the restrictive stipulations contained in the contract, and though the purchaser's requisitions are seldom confined to what he is strictly entitled to call for, frivolous and untenable requisitions must be avoided (*a*).

Such requisitions or objections as are important should not be delayed in cases where the purchaser may not be limited by the contract as to the time for their delivery, lest by so doing the purchaser may be held to have waived them (*b*); but an objection will not be impliedly waived which is not raised by the contents

(*a*) Dart, V. & P. 428.

(*b*) Sugd. V. & P. 343 *et seq.*

the title, if it may be fairly assumed that, if produced, it would not throw any difficulty upon the title.



SECTION 4.

General Requisitions made in certain Cases.

It is usual when any former owner of the property might have left a widow who would be entitled to dower, for the purchaser to inquire whether such former owner did leave a widow so entitled; and where a power has been created which does not appear to have been exercised, it is usual to inquire whether it was exercised, or, if partially exercised, whether there was any further or other exercise thereof.

Where a vendor is or has been married, it is usual to inquire whether he has made any settlement in contemplation of marriage affecting the property.

It is also usual to inquire whether the vendor is aware of any easement affecting an estate upon which a right may by any possibility exist, and (where the estate consists of land which is or has been subject to tenancies for life or other limited interests) whether there is any improvement loan affecting the property.

As regards improvement loans, a reference to the acts regulating the securities for the same and the granting thereof may not be out of place.

By the statute 8 & 9 Vict. c. 56, tenants for life, and certain other persons having a limited interest in lands,

are empowered, with leave of the Court of Chancery, to make permanent improvements by draining with tiles, stones or other durable materials, or by warping, irrigation or embankment in a permanent manner, or by erecting thereon any buildings of a permanent kind incidental or consequential to such drainage, &c., and to charge the money expended in making such improvements, and obtaining the authority of the court, upon the inheritance, such interest not exceeding five per cent. per annum, the principal to be repayable by annual instalments as therein mentioned (*m*).

The Public Money Drainage Acts (*n*) empower tenants for life and other owners of land to obtain advances from government for drainage works to be completed within five years (*o*), such advances to be paid by a rent-charge of 6*l.* 10*s.* per cent. payable for a term of twenty-two years (*p*).

The Improvement of Land Act, 1864 (*q*), provides for the raising of money by way of rent-charge for the improvement of land at a rate of interest not exceeding five per cent. per annum, and to be repayable by instalments extending over a period not exceeding twenty-five years (*r*).

A subsequent Act of Parliament (*s*) provides that the erection of a mansion house and such other necessary

(*m*) Sects. 3, 4, 5, 8, 9.

(*n*) 9 & 10 Vict. c. 101; 10 & 11 Vict. c. 11; 11 & 12 Vict. c. 119; 13 & 14 Vict. c. 31; 19 & 20 Vict. c. 9.

(*o*) 10 & 11 Vict. c. 11, s. 7.

(*p*) 9 & 10 Vict. c. 101, s. 34.

(*q*) 27 & 28 Vict. c. 114.

(*r*) *Id.* s. 26.

(*s*) 34 & 35 Vict. c. 34.

buildings commonly appurtenant, and the completion of any mansion house and such appurtenances already erected, and the improvement of, and addition to, any house capable of being converted into a mansion house, should be deemed improvements within the meaning of the Improvement of Land Act, 1864, but the sum to be charged on the estate for such purpose is not to exceed two years' rental of the whole estate (*t*).

It is usual to make a general inquiry whether the vendor or his solicitor is aware of any incumbrance, fact or circumstance not disclosed by the abstract affecting the property, though it has recently been decided (*u*) that such an inquiry is not a requisition, but is in the nature of an interrogatory, and need not be answered either by the vendor or his solicitor. If there is reason to believe that any particular incumbrance exists, an application should be made to the supposed incumbrancer; and where the interest purchased is an equitable one, inquiry should be made of the trustees or persons having the legal estate as to notice of incumbrances.

(*t*) 33 & 34 Vict. c. 56, s. 4.

(*u*) *In re Ford and Hill*, L. R., 10 Ch. Div. 365.

CHAPTER XI.
OF ASSURANCES TO PURCHASERS.

SECTION 1.

Preparation of Assurances.

HAVING investigated the title of the vendor to the estate proposed to be dealt with, the assurance thereof to the purchaser should next be considered.

Estates of freehold tenure are conveyed by deed of grant.

Estates of leasehold tenure are transferred by deed of assignment.

And estates of copyhold tenure are assured by means of surrender into the hands of the lord of the manor of which the same are holden, and admittance of the purchaser in terms of such surrender.

The contract usually stipulates that the costs of the preparation of the assurance to the purchaser and of all matters connected therewith shall be borne by him, though in the absence of such a stipulation the purchaser is bound to bear the expense, and in the case of an estate of copyhold tenure both of the surrender and admittance.

The preparation of the conveyance or assignment will

not operate as a waiver of objections to or requisitions upon the title (a), and it is usually prepared before search is made for incumbrances, such search being in fact usually made immediately preceding the completion of the purchase; and it is submitted that notwithstanding the contract may provide that all objections to or requisitions upon or in respect of the title shall be made within a specified time, still, in the event of any incumbrance being discovered upon search being made after that period, the purchaser is entitled to take objection in respect thereof, the abstract of title being rendered imperfect by the non-disclosure thus discovered. But the assurance should not be prepared until the deeds have been produced (b).



SECTION 2.

As to the Parties making the Assurance.

The first matter which will suggest itself when the estate is of freehold or leasehold tenure will be the parties to the conveyance or assignment, by which the same and all outstanding interests therein are to be conveyed or transferred.

The estate may be vested in trustees for sale or in a mortgagee or other parties occupying a fiduciary capacity, deriving their power of sale under some or one of

(a) *Burroughs v. Oakley*, 3 Sw.
159.

(b) *Jarman v. Egleston*, 5 Car.
& P. 172.

the acts to which reference has been made, or the vendor may have contracted to sell subject to or discharged from certain incumbrances, or by reason of marriage he or she may be unable alone to make a valid assurance; but the vendor may be in a position to execute a valid assurance without the consent or concurrence of any other person.

Should the estate be vested in a trustee or trustees for sale, it will of course have been ascertained in the investigation of the title that the events have taken place upon the happening of which the power of sale was exercisable, and that the necessary consents, if any, to the exercise thereof have been obtained, and that the parties executing the power have full and complete authority conferred upon them by the instrument creating the trust or by statutory enactment.

If the vendor is a mortgagee duly exercising a power of sale conferred by his mortgage deed, or by the Conveyancing and Law of Property Act, 1881, he cannot be required to procure the concurrence of the mortgagor (c).

If the estate is at the time of the contract subject to but sold discharged from incumbrances, such incumbrances must, as we have seen, be discharged by a separate deed at the vendor's expense, or if the incumbrancers concur in the assurance to the purchaser the vendor must bear the additional expense thereby occa-

(c) Sugd. V. & P. 396; *Allen v. Martin*, 5 Jur. 239.

sioned, and the same rule applies to any outstanding estate or interest.

Upon the sale of a bankrupt's estate, he usually joins in the conveyance and covenants for title (*d*), and the Bankruptcy Act, 1869, directs that the bankrupt shall execute such conveyances, &c., and do all such acts and things in relation to his property as may be reasonably required by the trustee or be prescribed by the rules of court, or directed by the court by any special order or orders made in reference to any particular bankruptcy, or made on the special application of the trustee or any creditor (*e*), and the Bankruptcy Act, 1883, sect. 24, sub-sect. 2, contains a provision to the same effect.

If the estate is of freehold tenure and the vendor has been married since the 1st of January, 1834, he can make a valid conveyance of the estate without the concurrence of his wife; but should he have been married previously to that date his wife must join in the conveyance, and her execution thereof must be acknowledged in the manner prescribed by the Act for the Abolition of Fines and Recoveries (*f*), unless the property has been conveyed to him to uses to bar dower.

In cases not coming within the Married Women's Property Act, 1882 (*g*), should the vendor be a married woman, the deed must be acknowledged by her under the last-named act, and her husband should also join in

(*d*) Sugd. V. & P., 11th ed.
706.

(*f*) 3 & 4 Will. 4, c. 74.

(*g*) 45 & 46 Vict. c. 75.

(*e*) 32 & 33 Vict. c. 71, s. 19.

the conveyance (*h*) ; but as to women married after the 31st of December, 1882, they are entitled to have, hold and dispose of all real and personal property which shall belong to them at the time of marriage, or which shall be acquired by or devolve upon them after marriage (*i*).

If the contract stipulates that certain persons shall join in the conveyance, whose consent is in fact unnecessary, the vendor cannot on that account decline to procure their concurrence (*k*).



SECTION 3.

As to the Parties to whom the Assurance is made.

Having come to a conclusion as to the parties from whom the estate and interest in the property is to be divested, the next consideration will be the party or parties in whom the estate is to be vested.

If the estate is of freehold tenure and the purchaser has been married since the 1st of January, 1834, it will be sufficient to take the conveyance simply unto and to the use of the purchaser for ever, and declare (if he is so desirous) that his widow (if any) shall not be entitled to dower out of the estate (*l*).

If the purchaser has been married prior to the 1st of January, 1834, and his wife be living at the time of

(*h*) 3 & 4 Will. 4, c. 74, s. 77.

(*i*) 45 & 46 Vict. c. 75, s. 5.

(*k*) *Benson v. Lamb*, 9 Beav. 402.

(*l*) See *supra*, Chap. Dower.

the conveyance to him, if he is desirous of barring her right to dower he should take the conveyance to the usual uses to bar dower.

If the estate be of leasehold tenure and the property of a married woman, not coming under the Married Women's Property Act, 1882, the husband may at any time during the coverture, without the concurrence of his wife, dispose of such estate either absolutely or by way of mortgage (*m*). The husband cannot, however, dispose of such an estate by his will (*n*); but if he survives his wife he will be entitled to it by his marital right, without the necessity of taking out administration (*o*); and he will have the same power though the wife's interest be reversionary or contingent (*p*), but if the wife's interest be equitable only, she must concur in and acknowledge the assurance thereof (*q*). If, however, the woman should have been married after the 31st of December, 1882, as we have seen, her leaseholds will belong to her for her separate use.

If an assurance is made to a person who does not actually pay the purchase-money, but it is paid by another person, a trust is thereby implied in favour of the person paying the amount, and parol evidence to prove that such is the case will be admitted in a court

(*m*) *Hill v. Edmonds*, 5 De Gex & S. 603.

(*n*) 2 Blackstone's Com. 434; *Doe d. Shaw v. Steward*, 1 Ad. & El. 300.

(*o*) Co. Litt. 46 b, 351 a.

(*p*) *Dormer v. Hart*, 2 Russ. & Mylne, 360.

(*q*) *Hanson v. Keating*, 4 Hare, 1.

of equity (*r*). If, however, the purchase be taken in the name of a wife, child or children, grandchild or illegitimate child, or any person towards whom the purchaser stands *in loco parentis*, it will be assumed the purchase was intended as an advancement (*s*), unless evidence is produced to negative such a presumption (*t*).

When real estate is purchased for partnership purposes it will be desirable to take the conveyance unto and to the use of the partners, as joint tenants at law, upon trust for such partners as part of the personal estate of the partnership according to the shares and interests of the partners therein.

But if the conveyance be made to the partners as joint tenants merely, though there would be a survivorship at law in case of the death of either of them, still in equity the survivor would hold the share of the deceased partner in the estate as a trustee for his representatives (*u*); and the same rule would apply to a purchase by two or more for the purpose of a joint speculation (*x*).

When a purchase is made by trustees for the purposes of their trust, the property is vested in them as joint tenants, and in all cases where land is conveyed to

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| (<i>r</i>) <i>Cripps v. Gee</i> , 4 B. C. C. 472. | 15 L. R., Eq. 55. |
| (<i>s</i>) <i>Glaister v. Hewer</i> , 8 Ves. 199; <i>Finch v. Finch</i> , 15 Ves. 43; <i>Ebrand v. Dancer</i> , 2 Cha. Ca. 96; <i>Kilpin v. Kilpin</i> , 1 M. & K. 542; <i>Hepworth v. Hepworth</i> , 11 L. R., Eq. 10; <i>Stock v. McAvry</i> , | (<i>t</i>) <i>Rider v. Kidder</i> , 10 Ves. 360; <i>Batson v. Salter</i> , 10 L. R., Ch. 431.
(<i>u</i>) <i>Morris v. Barrett</i> , 3 Y. & J. 384.
(<i>x</i>) <i>Lake v. Craddock</i> , 3 P. Wms. 158. |

more than one person so as to create a joint tenancy, if the purchase-money has been advanced by them in equal shares, such joint tenancy will exist both at law and in equity (*y*); but if the purchase-money be paid in unequal proportions the purchasers would be entitled in equity to the property in the shares in which the purchase-money was paid by them (*z*).

Prior to the Act to amend the Law of Real Property, when a deed was in the form of an indenture, every person taking any immediate benefit under it was made a party thereto. But now the act (*a*) provides that under an indenture an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also that a deed purporting to be an indenture shall have the effect of an indenture, although not actually indented (*b*).



SECTION 4.

Recitals.

Following the parties to the assurance will be the recital of such facts and circumstances as are necessary

(*y*) *Aveling v. Knipe*, 19 Ves. P., 11th ed. 902.
441.

(*a*) 8 & 9 Vict. c. 106.

(*z*) 2 Ves. sen. 258; 3 Atk.
735; but see *Lake v. Gibson*, 1
Eq. Ca. Ab. 291, and Sugd. V. &

(*b*) *Ib.* s. 5, which repealed 7 &
8 Vict. c. 76, s. 11, which was
a similar provision.

to explain the position and interests of the parties executing the instrument: thus, if the vendor is seised in fee, the fact of his seisin will be recited, and that he has contracted with the purchaser for sale of the estate, which will be sufficient without referring to any contract previously entered into between the parties, whether the sale was by auction or otherwise.

If the vendor possesses a power of appointment over the estate which it is intended shall be exercised by him, the instrument creating the power should be recited.

If the sale is by a mortgagee or trustee in exercise of a power of sale, the instrument creating the power should be recited together with the power to give discharges for the purchase-money (if any).

If the sale is effected by a mortgagor and mortgagee, it will be sufficient to recite that the mortgage has been effected, that the money remains owing on the security, and that the mortgagor and mortgagee have contracted with the purchaser for the sale to him of the estate.

If incumbrancers join in the conveyance to release or discharge the property from their charges thereon, the nature of such charges and the documents creating them must be recited; or should the estate sold be subject to outstanding charges or incumbrances, the documents effecting them should also be recited.

If the estate be of leasehold tenure the lease under which the property is held by the vendor should be recited, and when the intermediate dealings with the property have been extensive, it will be sufficient after

the recital of the lease to recite that by divers mesne assignments and other acts in the law the property has become vested either in the vendor or in some former owner from whom it may be necessary under the circumstances to trace the title on the purchase deed, such as a mortgagor or testator.

In cases where the statutory form, given by the Conveyancing and Law of Property Act, 1881, are strictly adhered to, recitals will be omitted; but it seems the practice of conveyancers, in most cases, to adopt the form of recital in use before the act.



SECTION 5.

Testatum.

Following the recitals will come the testatum, containing the consideration and the operative words of conveyance and assignment to the grantee or assignee. In this part of the deed the estate limited should be defined, as in various instances the testatum may be operative, and the habendum, to which we shall presently refer, rejected; the conveyance or assignment should therefore be limited to the grantee or assignee by name, and, before the Conveyancing and Law of Property Act, 1881, if the property were freehold, the limitation was to him and his heirs, and, if of leaseholds, to him, his executors, administrators, and assigns.

Prior to the act the operative words used for the con-

veyance of freehold property were "grant" or "grant and convey," and with reference to the word grant, although it was the proper term to be used in a deed of grant, its employment was not absolutely necessary, and other words indicating an intention to grant would have been effectual (c); but now as to deeds, whether executed before or since the act (d), the use of the word grant is not necessary in order to convey hereditaments, corporeal or incorporeal.

The words give or grant in a deed executed after the 1st of October, 1845, will not imply any covenant at law in respect of any tenements or hereditaments, except so far as it may do so by force of an act of parliament (e).

The Stamp Act of 1870 (f) enacts, that all facts and circumstances affecting the liability of any instrument to *ad valorem* duty, or the amount of the *ad valorem* duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument (g).

When timber or fixtures standing upon the estate are taken at a valuation the amount thereof must be included in the consideration, but not the value of chattels which pass by delivery, unless they be assigned by deed, in which case *ad valorem* duty attaches (h); and the mere recital of the sale and delivery, unless the articles referred to come within the description of

(e) *Haggerston v. Hanbury*, 5 Barn. & Cres. 101; *Shove v. Pineke*, 5 T. Rep. 124.

(d) 44 & 45 Vict. c. 41, s. 49.

s.

(e) 8 & 9 Vict. c. 106, s. 4.

(f) 33 & 34 Vict. c. 97.

(g) *Ib.* s. 10.

(h) Dart, V. & P. 525.

goods, wares and merchandise, will cause *ad valorem* duty to attach (*i*) ; but duty does not attach in respect of money paid by way of compensation for damage to adjacent property in the case of a conveyance under the Lands Clauses Consolidation Act, and such amount should not on that account be included in the consideration (*k*).

If copyholds are purchased with other property at one entire price the consideration in respect of the copyholds should be apportioned, as the *ad valorem* duty in respect of the copyholds will be denoted on the surrender.



SECTION 6.

Parcels—General Words—Estate Clause—Habendum.

The parcels in most cases follow the description of the estate contained in the contract, and it is a very common and convenient practice to describe the parcels by reference to a plan and schedules.

In cases of sales under the Consolidation Acts, if it is the intention that the mines and minerals should pass by the conveyance, they must be specified, as otherwise they will not pass (*l*).

Following the parcels come the general words and the habendum, and with reference to the former it may

(*i*) *Horsfall v. Hay*, 2 Exch. 778.

(*l*) 8 & 9 Vict. c. 20, s. 77; 10 & 11 Vict. c. 17, s. 18.

(*k*) *Dart, V. & P.* 528.

be remarked, that evidence will not be received at law to contradict the conveyance, by showing that property, which would *primâ facie* pass under general words, was not intended to be included in the purchase (*m*). The insertion of general words, however, is no longer necessary, for by the Conveyancing and Law of Property Act, 1881, s. 6, sub-ss. 1, 2 and 3, assurances of land, houses, buildings, manors or lordships are to be deemed to include and are to operate to convey, as far as a contrary intention is not expressed, all liberties, privileges, easements, rights and advantages whatsoever appertaining to the property assured.

The habendum determines and ascertains the estate or interest limited by the deed, though this, as we have before seen, is frequently done by the grant in the premises, in which case the habendum may lessen, enlarge, explain or qualify, but not contradict or be repugnant to, the estate granted in the testatum. And it is now provided by the Conveyancing and Law of Property Act, 1881, s. 51, that in a deed executed after the act it shall be sufficient in the limitation of an estate in fee simple to use the words in fee simple without the word heirs, and on the limitation of an estate tail to use the words in tail without the words heirs of the body, and on the limitation of an estate in tail male or in tail female, to use the words in tail male or in tail female, as the case requires, without the words heirs male of the body or heirs female of the

(*m*) *Doe d. Norton v. Webster*, 4 Per. & Dav. 270.

body. The estate clause follows the general words, but this will now be unnecessary, as the 63rd section of the act provides, as to conveyances made after the commencement of the act, as far as a contrary intention is not expressed, that every conveyance shall be effectual to pass all the estate and interest of the conveying parties in or to the property conveyed (n).



SECTION 7.

Covenants for Title.

After the habendum follow the covenants for title.

In assurances executed after the commencement of the Conveyancing and Law of Property Act, 1881, where a person is expressed to convey as beneficial owner, covenants for title by the person so conveying will be implied. Section 7 of the act contains the following provisions on the subject:—

“7.—(1) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is

(n) *Goodtitle v. Gibbs*, 5 B. & 243; *Wyburd v. Tuck*, 1 B. & P. C. 709; *Ware v. Cole*, 7 B. & C. 464.

made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say :

“(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

“That, notwithstanding anything by the person who so conveys, or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust

for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under

any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) :

“(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

“That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force,

unforfeited, unsurrendered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) :

“(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

“That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed ; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and thenceforth quietly hold,

occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made; and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more

perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

“(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

“That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained

in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceedings, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them :

“(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely) :

“That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required :

“(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, which covenant shall be deemed to extend to every such person's own acts only (namely) :

“That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

“(2) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction ; and a covenant on his part shall be implied accordingly.

“(3) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also con-

veys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the part of the husband in the same terms as the covenant implied on the part of the wife.

“(4) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

“(5) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

“(6) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

“(7) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.”

The vendor's solicitor should not permit his client to enter into an unusual covenant for title, as should the client be permitted to do so without the solicitor explaining to him the liability thereby incurred, the solicitor will be liable to the client for any loss occasioned by the covenant entered into (o).

Fiduciary vendors enter into no other covenant than that they have done no act to incumber the estate (p), and the same rule applies to incumbrancers joining in the assurance and releasing the estate (q).

When the sale is effected by trustees under a will, and the purchase-money is of considerable amount, it is usual to make the parties beneficially interested covenant for title to the extent of their respective interests, though according to the rule of the Court of Chancery a purchaser is not in such a case entitled to covenants for title (r).

If the estate sold should be the property of a married woman, the husband enters into the same covenants for title as if the estate were his own (s).

(o) Sugd. V. & P., 13th ed. 462; *v. Frampton*, 5 Hare, 560.
Stannard v. Ullithorne, 10 Bing. 491. (q) Dart, V. & P. 550.

(p) Sugd. V. & P. 575; *Staines v. Morris*, 1 V. & B. 8; *Worley* (r) Sugd. V. & P. 574.
 (s) Prid. Con. tit. “Pur. Deed.”

Where a power of sale is exercised with the assent of a tenant for life, the purchaser is entitled to covenants for title from him (*t*).

It is not the practice for a vendor to enter into absolute covenants for title, but such covenants are limited to the acts of parties having had possession since the last sale of the estate: thus, if the vendor himself purchased the estate for a valuable consideration, the covenants would be limited to the acts of himself, but if the property should have descended to the vendor or have been devised to him, then the covenants will extend to the acts of the deviser as well as the vendor (*u*).

Covenants for title are said to run with the land, that is, they will pass by the common law to the assignees of the land, whether such land be of freehold, copyhold (*x*) or leasehold tenure (*y*), who may maintain actions upon them against the vendor and his real and personal representatives (*z*), but the covenants should be entered into with the seisinnee to uses on the sale of an estate in fee (*a*).

Restrictive covenants entered into by a purchaser in fee simple, precluding him from building or using the land in any particular manner, are not covenants which run with the land (*b*); but a purchaser of land from a

(*t*) *Re London Bridge*, 13 Sim. 436; *Lewis v. Campbell*, 3 Barn. & Ald. 392.
176; *Earl Poulet v. Hood*, 5 L.R., Eq. 115.

(*u*) Sugd. V. & P. 574.

(*z*) Sugd. V. & P. 576, and cases there cited.

(*x*) *Riddell v. Riddell*, 7 Sim. 629.

(*a*) Sugd. V. & P. 467.

(*y*) *Nokes v. Ander*, Cro. Eliz.

(*b*) *Keppell v. Bailey*, 2 My. & K. 517.

vendor who is personally liable for the observance of restrictions of this nature in respect of the land sold is bound to covenant with the vendor to remain subject to such restrictions, if on the purchase it was intended that he should remain so subject to them (c), and the same rule will apply to liabilities for which the estate stands as a security (d).

Equity will, however, restrain a purchaser under such restriction, and persons purchasing from him with notice thereof, from using the land in such a way as to commit a breach of the covenant (e); but want of notice by reason of the purchaser's neglect to investigate the title will not protect him, if by so doing the restrictive covenant or covenants would have been disclosed (f).

A vendor who has taken a covenant from several purchasers of plots of building land, to build in a specified manner, cannot compel a purchaser to observe the covenant, if he has permitted breaches of the covenant to be committed by others (g).

Purchasers buying land adjoining to other land, subject to restrictive stipulations, cannot claim the benefit of such stipulations, if they were not aware of them at the time of their purchase. And in a case where the

(c) *Moxhay v. Inderwick*, 1 De G. & S. 708.

(d) *Waring v. Ward*, 7 Ves. 332.

(e) *Eastwood v. Lever*, 12 W. R. 195; *Tulk v. Moxhay*, 2 Phil. 774; *Jay v. Richardson*, 30 Beav.

563; *Western v. Macdormott*, 1 Eq. 499; 2 Ch. 72.

(f) *Wilson v. Hart*, 1 L. R., C. A. 463; *Fielden v. Slater*, 7 L. R., Eq. 523.

(g) *Peek v. Matthews*, 3 L. J., Eq. Ca. 515.

original vendor of the entire estate repurchased the property in respect of which the restrictive covenants were entered into, it was held that he could make a good title to the land repurchased discharged from such covenants (*h*).

The covenants for title usually contained in a conveyance of freehold property, where the vendor is the party beneficially interested in the purchase-money, are that the vendor is seised in fee, has right to convey, for quiet enjoyment, freedom from incumbrances, and for further assurance.

The usual covenants contained in an assignment of leaseholds are, that the lease is valid, that the rent has been paid, and the covenants have been performed, for right to assign, for quiet enjoyment, freedom from incumbrances, and for further assurance.

The assignment usually contains a covenant by the purchaser to pay the rent and perform the several covenants contained in the lease under which the property is held, and to indemnify the vendor therefrom; but in a sale by the assignees of a bankrupt, the purchaser cannot be required to enter into such a covenant (*i*), though it is otherwise on a sale by an executor (*k*); and it is assumed that a purchaser cannot in any case be called upon to enter into such a covenant where the vendor will not be under any liability to the rent and

(*h*) *Keates v. Lyon*, 4 L. R., Mer. 265.
Ch. 218.

(*k*) *Cochrane v. Robinson*, 11

(*i*) Sugd. Con. V. & P. 25; 1 Sim. 378.

covenants after having parted with the lease or his interest therein.

The covenant that the vendor is seised in fee of an estate of freehold tenure will be broken if the estate turns out to be copyhold (*l*).

The covenant that the vendor and another conveying party have good right to convey will be broken if such other party be incompetent to transfer (*m*).

The following have been held to be breaches of the covenant for quiet enjoyment:—

A notice to tenants to pay rent to an adverse claimant (*n*);

A claim in respect of arrears of quit rent (*o*);

An obstruction of a necessary right of way (*p*);

A wrongful claim or eviction by the covenantor or his representatives (*q*); but a wrongful claim or eviction by a stranger is not a breach (*r*).

The covenant for further assurance will not entitle the purchaser to a covenant for production of title deeds (*s*), nor will it entitle him to require the vendor to do or procure to be done an unnecessary act (*t*).

(*l*) *Gray v. Briscoe*, Noy, 142.

(*m*) *Nash v. Ashton*, Sir T. Jones, 195.

(*n*) *Dart*, V. & P. 782.

(*o*) *Hammond v. Hill*, Com. R. 180.

(*p*) *Morris v. Edgington*, 3 Taun. 24; *Andrews v. Paradise*, 8 Mod. 318.

(*q*) *Jarm. Con.* by S. 376; *Woodroff v. Greenwood*, Cro. Eliz.

518; *Morgan v. Hunt*, 2 Vent.

213; *Lloyd v. Tomkies*, 1 T. R. 671; *Perry v. Edwards*, 1 Str.

400.

(*r*) *Kirby v. Hansaker*, Cro. Jac. 315; *Dudley v. Folliott*, 3

Tr. R. 584.

(*s*) *Hallett v. Middleton*, 1 Russ. 243.

(*t*) *Warn v. Bick*, 9 Pri. 43.

But a purchaser, who has delivered up all the title deeds to a purchaser of part of the lands, may require the party entering into the covenant for further assurance to execute a duplicate conveyance (*u*), in such a case, or in the event of the original conveyance having been burnt (*x*), or may require the removal of a judgment or other incumbrance (*y*).

The usual covenants for title will enable a purchaser to recover the value of the lands and buildings erected thereon subsequent to the purchase, in case of eviction though this was at one time doubted (*z*).

On sales by the crown the purchaser will not get any covenants for title (*a*).

In cases where the purchaser is entitled to a covenant for production of deeds, it is desirable that such covenants should be entered into by a separate deed, unless the documents covenanted to be produced are recited or appear upon the face of the conveyance, and the same rule applies to any covenant entered into with a view of providing for a defect in title which can be kept off the face of the conveyance (*b*).

On the purchase of a reversionary interest the succession duty payable on the reversion falling into possession should not be overlooked; unless otherwise

(*u*) *Napper v. Lord Allington*, 1 Eq. Ca. Ab. 166.

(*x*) *Bennet v. Ingoldsby*, Finch, 262.

(*y*) *King v. Jones*, 3 Taun. 418.

(*z*) *Binney v. Hopkinson*, 27 Beav. 565; *Lewis v. Campbell*, 8 Taun. 715.

(*a*) Sugd. V. & P. 575.

(*b*) Sugd. V. & P., 11th ed., p. 702.

provided for as between vendor and purchaser, the purchaser must pay the duty (c).

When the conveyance is by tenant for life and remainderman the usual course is for the duty to be compounded for under the Succession Duty Act (d), or the remainderman enters into a covenant to indemnify the purchaser therefrom (e).

If a purchaser be evicted, and the eviction is within the covenant, he may bring an action for damages; but unless the eviction be within the covenant, or there was a fraudulent concealment of the defect, a purchaser cannot recover the purchase-money in case of eviction. And with reference to the covenant that the vendor is seised or possessed of the interest purporting to be transferred, or that he has right to convey or assign the same, a breach arises immediately after the execution of the deed containing it if the vendor is not so seised and does not possess the right covenanted for, and the purchaser may at once commence an action without waiting to be evicted. But with reference to the covenant for quiet enjoyment, free from incumbrances, no breach will occur until disturbance; though if the covenant be that the estate is free from incumbrances a breach would arise as soon as the covenant is made. Covenants against incumbrances do not, however, run in this form, but the covenant usually is that the

(c) *Cooper v. Treuby*, 28 Beav. 194.

(d) 16 & 17 Vict. c. 51, ss. 40, 41.

(e) *Prid. Con.* vol. 1, p. 265, n.

purchaser shall enjoy and that free from incumbrances (*f*).

The Statute of Limitations would, consequently, in the case first supposed, run as against the covenantee immediately after the execution of the conveyance; but in the subsequent one, from the time of the breach (*g*).

In certain cases a purchaser is not left to his remedy on the covenants in his purchase deed, but may claim to have the contract rescinded and the purchase-money returned, as where representations have been made by the vendor affecting the value of the property and afterwards prove to be incorrect and were so to the knowledge of the party making them (*h*); and a fraudulent concealment by either vendor (*i*) or purchaser (*k*) of a material circumstance affecting the value of the property would have the same effect, but a clear fraud must be established or there will be no relief (*l*); and there are few cases in which a purchaser can rescind a contract after completion on account of the price being unreasonable, or a vendor on account of inadequacy of consideration (*m*).

(*f*) Sugd. V. & P., 13th ed.
498.

(*g*) 9 Jarm. Con. by S. 402.

(*h*) Sugd. V. & P., 11th ed. 271.

(*i*) *Early v. Garrett*, 4 M. & R.
687.

(*k*) *Turner v. Harvey*, Jac. 169;
Barry v. Armitstead, 2 Keen,
221.

(*l*) *Small v. Attwood*, You. 435.

(*m*) Sugd. V. & P., 13th ed.
231.

SECTION 8.

Satisfied Terms.

Prior to the Act for rendering the Assignment of Satisfied Terms unnecessary (*n*), an assignment of a term to attend the inheritance frequently accompanied the purchase deed. But the act just referred to provides that every satisfied term of years which either by express declaration or by construction of law shall upon the 31st day of December, 1845, be attendant upon the reversion or inheritance of any lands shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although thereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with after the said 31st day of December, 1845, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term (*o*).

The act further provides that every term of years then subsisting or thereafter to be created, becoming satisfied after the 31st day of December, 1845,

(*n*) 8 & 9 Vict. c. 112.

(*o*) *Id.* s. 1.

and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any land, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid (*p*).

The word land, for the purposes of the act, extends to all freehold tenements and hereditaments whether corporeal or incorporeal, and to all such customary lands as will pass by deed or deed and admittance, and not by surrender. It seems, therefore, that the act does not extend to demises by way of underlease nor copyholds, nor customary hereditaments not being land, nor customary lands passing by deed, surrender, and admittance (*q*); and a term assigned to a trustee in trust to secure a mortgage debt, and subject thereto to attend the inheritance, is not an attendant term within the act (*r*).

Whenever, therefore, a term has been created out of the estate, the purchaser should not dispense with an assignment or surrender thereof until he has ascertained that the term is actually a satisfied term within the meaning of the act (*s*).

(*p*) 8 & 9 Vict. c. 112, s. 2.

(*q*) Dav. Con. P., 5th ed. p. 73.

(*r*) *Shaw v. Johnson*, 1 Drew. & Smale, 412.

(*s*) *Plant v. Taylor*, 5 L. T.,

N. S. 318; *Do: d. Clay v. Jones*,

13 Jur. 824; *Owen v. Owen*, 10 Jur. 877.

SECTION 9.

Assurances of Copyholds.

When the estate sold is of copyhold tenure, if the vendor is beneficially interested the surrender to the purchaser is usually accompanied by a deed implying the ordinary covenants for title.

If the vendor is a trustee for sale under a will containing an authority to sell merely without a devise to him, a bargain and sale is executed under which the purchaser is admitted, and a double admittance with the consequent fines thus avoided (*t*) ; but if there is a devise to trustees, the lord can require them to be admitted, and they cannot avoid the fees consequent thereon by calling upon the lord to admit an infant heir (*u*), though he cannot in such a case seize quousque for want of a tenant, and the estate will remain in the customary heir until the devisee is admitted (*x*).

The surrender may be made either in or out of court. If made in court it is entered on the court rolls of the manor, and a copy of the entry, signed by the steward, and stamped, is delivered to the purchaser. If the surrender is made out of court, the document evidencing the surrender is signed by the parties and the steward, and stamped, and entered upon the court rolls (*y*).

(*t*) *Glass v. Richardson*, 2 De G., M. & G. 658; *Reg. v. Wilson*, 9 Jur., N. S. 439.

Q. B. 219.

(*x*) *Garland v. Mead*, 6 L. R., Q. B. 441.

(*u*) *The Queen v. Garland*, L. R.,

(*y*) See 4 & 5 Vict. c. 35, s. 89.

The legal assurances are usually prepared by the steward of the manor.

Until admission the surrenderor remains tenant to the lord, and the person to whose use the surrender is made acquires merely a right to be admitted (*z*), which right may be exercised at any time, though it is usually done immediately; but whenever the admission is taken, it will relate back to the surrender (*a*), and on such admission the surrenderee becomes tenant to the lord, to whom he must pay the customary fine for such his admission; but a covenant to surrender will not give the lord a right to a fine.

The equitable interest of the covenantee will pass by assignment, and the lord is bound to admit the assignee on payment of one fine (*b*), but it cannot be surrendered except for the purpose of barring an entail.

The fine paid to the lord is either certain or arbitrary; but if arbitrary is restrained to two years' improved value of the land, after deducting quit rents (*c*).

The admission of one joint tenant or one co-parcener is the admission of their companions, and one fine only on their admission is therefore payable (*d*), and in the absence of special custom the steward is entitled to one fee only (*e*). Tenants in common must, however, be

(*z*) *Doe d. Tofteld v. Tofteld*, 11 East, 246; *Doe d. Winder v. Lawes*, 7 Ad. & E. 195; *Rez v. Dame Jane St. John Mildmay*, 5 B. & Ad. 254.

(*a*) 1 Watk. Cop. 103.

(*b*) *The King v. The Lord of the Manor of Hendon*, 2 T. R. 484.

(*c*) 1 Watk. Cop. 308.

(*d*) Scriv. Cop. 347.

(*e*) *Traherne v. Gardiner*, 5 El. & Bl. 913.

admitted severally, and pay a fine in respect of the share to which they are admitted, and on their death, as also on the death of a co-parcener, the representatives must be admitted and pay several fines in respect of their admissions (*f*).

Where copyholds are limited in remainder subject to any particular estate, the admission of the tenant of the particular estate is the admission of those in remainder, and one fine only is payable, which fine should be apportioned between the tenant of the particular estate and the remaindermen, and should be paid by the latter on his coming into possession (*g*); but if a special custom exists by which a fine is payable by the remainderman on coming into possession, he should be admitted (*h*).

On an estate falling into the possession of a reversioner he may enter without re-admission or payment of a fine, but the heir of the reversioner must be admitted and pay a fine, and the same rule applies in the case of the heir of a remainderman, and such heir may surrender before admittance (*i*), though a surrender by a surrenderee before his admittance is void (*k*).

Neither the Statute *De donis* (*l*) nor the Statute of Uses (*m*) extend to copyhold estates, and the lord of a

(*f*) 1 Watk. Cop. 82.

(*g*) Scriv. Cop. 294.

(*h*) *Doe d. Whitbread v. Jennings*, 8 East, 522; 1 Watk. Cop. 36.

(*i*) *The Queen v. The Lady of*

the Manor of Dallingham, 8 Ad. & El. 885; *Evelyn v. Worsfold*, 15 Law T. R. 4.

(*k*) 1 Watk. Cop. 81.

(*l*) 13 Edw. 1, c. 1.

(*m*) 27 Hen. 8, c. 10.

manor is not bound to receive a surrender of copyholds by a deed burthened with trusts or to such trusts as the surrenderee shall appoint, and in default of appointment to the use of the surrenderee, his heirs and assigns (*n*).



SECTION 10.

Enfranchisement of Copyholds.

Copyholds are frequently relieved from the burthens imposed upon them by reason of that tenure by enfranchisement; this may be effected by agreement with the lord or under the Copyhold Acts, and by means of which the lord as well as the tenant may compel enfranchisement.

The Copyhold Act of 1841 (*o*) enables the lord of a manor, whatever may be his estate or interest therein, with the consent of the commissioners, to enfranchise any lands, and any tenant, whatever may be his estate or interest, to accept such enfranchisement; subject to a provision requiring in the case of any party to an enfranchisement having less than an absolute interest the giving of certain notices to the other parties interested (*p*).

The Copyhold Act of 1852 (*q*) enables the tenant or lord to compel enfranchisement after the next admission

(*n*) *Flack v. Downing College*,
13 C. B. 945.

(*o*) 4 & 5 Vict. c. 35.

(*p*) *Ib.* s. 52.

(*q*) 15 & 16 Vict. c. 51.

on or after the 1st of July, 1853, provided that no such tenant shall be entitled to require such enfranchisement until after payment or tender of the fine or fines, and of the fees consequent on such admittance; provided also, that if from any cause such enfranchisement shall not take place until some event shall have happened, which may require a second or any subsequent admittance, such second or subsequent admittance shall be made with all the rights incident thereto, as if the act had not been passed, and it shall be competent for the lord or tenant to require and compel enfranchisement upon or after such second or subsequent admittance in the manner thereby provided for enfranchisement upon the next admittance (*r*).

The act also provides that the expenses of such enfranchisement shall be borne by the person requiring it (*s*).

The Copyholds Act of 1858 (*t*) provides for the enfranchisement of copyhold lands, the last admittance to which may have taken place before the 1st of July, 1853; and provides that no tenant shall be entitled to require such enfranchisement until after payment or tender of such a fine and of the value of such a heriot as would become due or payable in the event of admission or death subsequent to the 1st of July, 1853, and also of two-thirds of such a sum as the steward would have been entitled to for fees (*u*).

(*r*) 15 & 16 Vict. c. 21, s. 1.

(*t*) 21 & 22 Vict. c. 94.

(*s*) *Ib.* s. 30.

(*u*) *Ib.* s. 6.

The act also contains provisions for carrying out enfranchisements and ascertaining the sum to be paid in respect thereof, under the direction of the copyhold commissioners (*x*).

In the absence of the copyhold acts the lord cannot absolutely enfranchise, unless he has the whole freehold interest (*y*).

Any enfranchisement which may be made must be made to the tenant; and though the tenant may not have the whole fee in himself, an enfranchisement effected by him will enure for the benefit of those in remainder, as also for his own benefit (*z*).

(*x*) 21 & 22 Vict. c. 94, ss. 8, 9,
and 10.

(*y*) 1 Watk. Cop. 437.

(*z*) 1 Watk. Cop. 437, 438.

CHAPTER XII.
SEARCHES FOR INCUMBRANCES.

SECTION 1.

What Searches usually made.

SHOULD the estate or any portion of it be situate in either the counties of Middlesex or York or the town and county of Kingston-upon-Hull, or form part of the great level of the fens called Bedford Level, search should be made before completion of the purchase in the registries established under the acts presently referred to, and whether the property be situate either in the places above mentioned or elsewhere, searches should be made in the Central Office of the Supreme Court of Judicature for judgments, crown debts, *lis pendens*, annuities, and executions, and search should also be made for bankruptcies and insolvencies affecting the title.

SECTION 2.

Searches in the Local Registries.

The statute 7 Anne, c. 20, enacts that a memorial of all deeds and conveyances and of all wills and devises in writing of or concerning or whereby any honors,

manors, lands, tenements or hereditaments in the county of Middlesex may be in any way affected in law or equity may be registered as by the act directed, and that every such deed and conveyance shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof shall be registered as directed by the act before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim; and that every such devise by will shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee, unless a memorial of such will be registered in the manner directed by the act (a).

That all memorials of wills which shall be registered within six months after the death of the devisors dying in Great Britain, or within three years after the death of devisors dying on the sea or beyond the seas, shall be valid as against subsequent purchasers (b); but no protection will be given to devisees under a will which has not been discovered by them until the expiration of six months after the death of the testator, and when in consequence no registration of the will or of the impediment preventing its registration has been made within the prescribed time (c).

That the act does not extend to any copyhold estates or to any leases at a rack rent, or to any lease not

(a) Sect. 1.

(b) Sect. 8.

(c) *Church v. Turner*, 1 L. R.,
Ch. 310.

exceeding twenty-one years where the actual possession and occupation goes with the lease, or to any of the chambers in Serjeants' Inn, the Inns of Court, or Inns of Chancery (*d*).

That no statute or recognizance (other than shall be entered up on account of the crown) shall affect or bind any honors, manors, lands, tenements or hereditaments situate in the county of Middlesex until a memorial thereof shall be registered in the manner directed by the act (*e*).

The 2 & 3 Anne, c. 4, contains similar provisions (*f*) to sects. 1, 8 and 17 of the Middlesex Act with reference to deeds, conveyances and wills relating to honors, manors, lands and tenements situate within the West Riding of the county of York; and sect. 4 of the 5 & 6 Anne, c. 18, which purports to make the register established for the West Riding more effectual, is similar to sect. 18 of the Middlesex Act, but thirty days are allowed to elapse between the entering up of the judgment and the registration thereof.

The 6 Anne, c. 35, contains similar provisions (*g*) to the Middlesex Act with reference to deeds, conveyances, wills, judgments and recognizances relating to honors, manors, lands and tenements situate in the East Riding and the town and county of the town of Kingston-upon-Hull, and as in the West Riding Act thirty days are

(*d*) 7 Anne, c. 20, s. 17.

(*e*) Sect. 18.

(*f*) Sects. 1, 16, and 20.

(*g*) Sects. 1, 14, 19, and 29.

allowed to elapse between the entering up of the judgment and the registration thereof.

The 8 Geo. 2, c. 6, contains similar provisions (*h*) to the Middlesex Act with reference to deeds, conveyances, wills, judgments and recognizances relating to honors, manors, messuages, lands and tenements situate in the North Riding, but twenty days are allowed to elapse between the entering up of the judgment and the registration thereof.

By the two last-mentioned acts (*i*), the words grant, bargain and sell, in a deed of bargain and sale of an estate in fee simple enrolled in the registry, imply covenants for quiet enjoyment of the lands against the bargainor, his heirs and assigns, and all claiming under him, and also for further assurance by the bargainor thereof, his heirs and assigns, and all claiming under him, unless restricted by express words.

The Vendor and Purchaser Act, 1874 (*j*), provides that where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law on that behalf, an assurance of such land to a purchaser or mortgagee by the devisee, or by some one deriving title under him, shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law (*k*).

It is a very prevalent practice to confine the search

(*h*) Sects. 1, 15, 18 and 24.

(*j*) 37 & 38 Vict. c. 78.

(*i*) 6 Anne, c. 35, ss. 30, 34; 8

(*k*) Sect. 8.

Geo. 2, c. 6, s. 35.

for incumbrances registered under the above acts to the period which has elapsed from the last purchase or mortgage transaction, relying upon the presumption that sufficient searches were made on behalf of the former purchaser or mortgagee, but the proper course is to search for dealings with the property during the whole period for which the title is deduced.

Registration under the above acts is not of itself notice, and a purchaser or mortgagee obtaining the legal estate is not affected by a prior equitable registered incumbrance of which he had no notice (*l*), though if the register is searched the party searching will be deemed to have notice of every document registered during the period for which he searched (*m*); and a purchaser who buys with notice of an unregistered deed is bound by such deed in equity as though it had been registered (*n*); but a further charge in favour of a first mortgagee should be registered, and will be postponed to a subsequent registered mortgage taken without notice of the further charge (*o*); and a third mortgagee who has registered his mortgage has been held to be entitled to priority over a second mortgagee who had not taken that precaution (*p*).

The assignment of a legacy charged on real estate is

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| (<i>l</i>) <i>Wiseman v. Westland</i> , 1 You. & J. 117; <i>Morecock v. Dickens</i> , Ambl. 678; <i>Underwood v. Courtown</i> , 2 Sch. & Lef. 64; see, however, <i>Rolland v. Hart</i> , Weekly Notes, 1871. | (<i>n</i>) <i>Le Neve v. Le Neve</i> , 3 Atk. 346; <i>Blades v. Blades</i> , 1 Eq. Ab. 358. |
| (<i>m</i>) <i>Hodgson v. Dean</i> , 2 Sim. & Stu. 221. | (<i>o</i>) <i>Credland v. Potter</i> , L. R., 10 Ch. 8. |
| | (<i>p</i>) <i>In re Wright's Mortgage Trusts</i> , 16 Eq. 41. |

not within the Registry Acts, and it has been held that a mortgagee of a legacy so charged, who registered his deed, did not acquire any priority over a prior unregistered incumbrance (*q*), but a deed of appointment under a power should be registered (*r*).

A deposit of deeds to secure a debt, accompanied by an agreement on the part of the borrower to execute a legal mortgage on demand, requires registration (*s*).

It is the practice to require the registration of a beneficial lease for a term not exceeding twenty-one years, where it is assigned for a valuable consideration, though it is doubtful whether the mere assignment for a valuable consideration and not by way of mortgage takes the transaction out of the exception contained in the act (*t*); and the non-registration of a lease will not be got over by registering an assignment in which the lease is recited (*u*).

It is assumed that if the vendor is both heir and devisee, registration of the will, so far as regards any devise to such heir, is unnecessary, and that in the case of a chattel interest in real estate which devolves by operation of law upon the executor, registration of the will would also be unnecessary.

The Bedford Level Act (*v*) enacts that no lease, grant

(*q*) *Malcolm v. Charlesworth*, 1 Keen, 63.

(*r*) *Scrutton v. Quincy*, 2 Ves. sen. 413.

(*s*) *Neve v. Pennell*, 2 H. & M. 170.

(*t*) *Prid. Con.*, tit. "Search for Incumbrances."

(*u*) *Honeycomb v. Waldron*, 2 Str. 1064.

(*v*) 15 Car. 2, c. 17, s. 8.

or conveyance of or charge upon the 95,000 acres therein comprised or any part thereof, except leases for seven years or under in possession, shall be of force but from the time of their registry at the Bedford Level office.

It has been decided upon the construction of this statute, that conveyances of the lands forming part of the 95,000 acres which were not registered were nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred by the act as owners of lands within the level and for the other purposes of the act (*w*).



SECTION 3.

Judgments.

Prior to the act of 1 & 2 Vict. c. 110, a moiety only of a debtor's freehold lands could be extended under an elegit (*x*), and copyholds could not be extended at all (*y*), nor an advowson in gross (*z*), nor estates in joint tenancy after the death of the joint tenant, nor estates tail so as to affect the issue in tail (*a*); and chattels real were only bound from the time when a writ of execution was lodged with the sheriff.

The 10th section of the Statute of Frauds (*b*) em-

(*w*) *Wallis v. Brown*, 10 Sim. 127; *Hodson v. Sharpe*, 10 East, 350.

(*x*) 13 Edw. 1, c. 18. The entirety might be taken under two judgments of the same term,

Att.-Gen. v. Andrew, Hard. 33.

(*y*) 3 Co. 9.

(*z*) 3 Bac. Abr. 382.

(*a*) *Ashburnham v. St. John*, Cro. Jac. 85.

(*b*) 29 Car. 2, c. 3.

powers the sheriff to deliver execution of all such lands, &c. as any person or persons should be seised or possessed of in trust for the debtor, as if the debtor had been seised of such lands, &c. for such estate as they be seised for him at the time of execution sued.

This provision did not affect trusts of terms of years (*c*), or equities of redemption (*d*), or estates held in trust for the debtor at the date of the judgment but aliened before execution (*e*).

To facilitate searches for judgments a docket was provided (*f*), and in order that a judgment might become binding as against purchasers or mortgagees it had to be docketed, and, if intended to affect land in a register county, entered in the local registry (*g*).

The law relating to judgments, so far as they affect the lands of a debtor, is governed by provisions contained in the following acts of parliament: viz., 1 & 2 Vict. c. 110; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15; 23 & 24 Vict. c. 38; 27 & 28 Vict. c. 112.

The 1 & 2 Vict. c. 110, s. 11, empowers the creditor to take in execution all lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the

(*c*) *Scott v. Scholey*, 8 East, 467.

(*d*) *Burdon v. Kennedy*, 3 Atk. 739.

(*e*) *Hunt v. Coles*, Com. R. 226; *Harris v. Pugh*, 4 Bing. 335;

Higgins v. York Bld. Co., 2 Atk. 107.

(*f*) 4 & 5 Will. & Mary, 320; 7 & 8 Will. 3, c. 36.

(*g*) *Johnson v. Holdsworth*, 1 Sim. N. R. 106.

person against whom execution is sued or any person in trust for him may be seised or possessed at the date of the judgment or at any time afterwards, or over which such person shall have any disposing power which he might, without the assent of any other person, exercise for his own benefit.

The 13th section makes a judgment to operate as a charge on all lands, tenements, rectories, advowsons, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the debtor should at the time of entering up such judgment or at any time afterwards be seised, possessed or entitled for any estate or interest whatever at law or in equity, or over which such debtor shall at the time of entering up such judgment or at any time afterwards be seised, possessed or entitled for any estate or interest whatever at law or in equity, or over which such debtor shall at the time of entering up such judgment or at any time afterwards have any disposing power which he might, without the assent of any other person, exercise for his own benefit, and shall be binding as against the debtor and all persons claiming under him, and shall also be binding against the issue of his body and all other persons whom he might, without the assent of any other person, debar from any remainder, reversion or other interest; and it is provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of his charge until the expiration of one year from the entering up of the judgment, and that the charge shall not give him

any preference in bankruptcy unless the judgment was entered up one year at least before the bankruptcy of the debtor, and also that nothing contained in the act shall affect any doctrine of courts of equity whereby protection is given to purchasers for valuable consideration without notice.

By the 18th section, all decrees and orders of courts of equity, all rules of courts of law, all orders of the lord chancellor or of the court of review in matters of bankruptcy, and all orders of the lord chancellor in matters of lunacy, whereby any sum of money or any costs, charges and expenses shall be payable to any person, are respectively put upon a similar footing to judgments.

The 19th section provides that no judgment, decree, order or rule shall by virtue of that act affect any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name and the usual or last-known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the court and the title of the matter or cause in which such judgment, order, decree or rule shall have been obtained or made, and the date of such judgment, decree, order or rule, and the account of the debt, damages, costs or moneys thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster.

By the 2 & 3 Vict. c. 11, s. 4, all judgments of the

superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which, since the passing of the act of the 1 & 2 Vict. c. 110, have been registered under the provisions therein contained, or which shall hereafter be so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements and other hereditaments as to purchasers, mortgagees or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior master of the said Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right, title, estate or interest in or to any such purchaser or mortgagee for valuable consideration, and so *toties quoties* at the expiration of every succeeding five years.

It is provided by section 5 of the act, that no judgment shall affect lands, &c. as against purchasers or mortgagees without notice further or otherwise, although duly registered, than a judgment would have bound such purchaser or mortgagee before the 1 & 2 Vict. c. 110.

By the 3 & 4 Vict. c. 82, s. 2, it is provided, that no judgment, &c. should by virtue of the act of 1 & 2 Vict. c. 110, affect any lands, &c., at law or in equity, as to purchasers, mortgagees or creditors, unless the same was registered, any notice of any such judgment, &c. to

any such purchaser, mortgagee or creditor in anywise notwithstanding.

By the 18 & 19 Vict. c. 15, s. 4, it is provided, that no judgment, &c. which might be registered under the said act of 1 & 2 Vict. c. 110, shall affect any lands, &c. as to purchasers, mortgagees or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the proper officer of the proper court, any notice of any such judgment, &c. to any such purchaser or mortgagee or creditor in anywise notwithstanding.

It is provided by the 6th section, that it shall be sufficient to bind purchasers, mortgagees and creditors, if such a memorandum or minute as was required in the first instance is again left with the senior master of the Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right, title, estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditors accrued as directed by the said last-mentioned act, although more than five years shall have expired, by effluxion of time since the last previous registration, before such last-mentioned memorandum or minute was left, and so *toties quoties* upon every re-registry.

It is provided by section 11, that where any legal or equitable estate or interest or any disposing power in or over any lands, &c. shall, under any conveyance or

other instrument executed after the passing of the act, become vested in any person as a purchaser or mortgagee, such lands, &c. shall not be taken in execution under any writ of elegit or other writ of execution to be sued upon any judgment, &c. against any mortgagee thereof who shall have been paid off prior to or at the time of the execution of such conveyance, nor shall any such judgment, &c. or the moneys thereby secured be a charge upon such lands, &c. so vested in purchasers or mortgagees; and the section contains a similar provision as to crown debts.

By the 23 & 24 Vict. c. 38, s. 1, it is provided, that no judgment, statute or recognizance to be entered up after the passing of the act shall affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration or a mortgagee (whether such purchaser or mortgagee has notice or not of any such judgment, &c.), unless a writ or other due process of execution of such judgment, &c. shall have been issued and registered as thereafter mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him, yet so that no such judgment, &c., nor any writ of execution or other process thereon, shall affect any land as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.

It is provided by the second section, that the registry thereinbefore required of any writ of execution or other due process on any judgment, &c. in order to bind a purchaser or mortgagee shall be made by a memorandum or minute referring to the judgment, &c. already registered, so as to connect the registry of the writ of execution or other process therewith, such memorandum or minute to be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, &c. upon which the writ of execution or other process issued was registered, and also the year and the day of the month when every such memorandum or minute shall be left with him.

By the 27 & 28 Vict. c. 112, after reciting that it is desirable to assimilate the law affecting freehold, copyhold and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes and recognizances, it is provided that no judgment to be entered up after the passing of the act (the 29th July, 1864) shall affect any land of whatever tenure, until the same shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority in pursuance of such judgment.

The 2nd section provides, that the term "land" shall include all hereditaments, corporeal or incorporeal, or any interest therein.

The 3rd section provides, that every writ or other

process of execution of any such judgment, &c. by virtue whereof any hereditaments shall have been actually delivered in execution, shall be registered in the manner provided by the 23 & 24 Vict. c. 38, but in the name of the debtor instead of the creditor, and that no other or prior registration of such judgment shall be necessary for any purpose.

It is provided by the 4th section, that every creditor to whom any hereditaments of his debtor shall have been actually delivered in execution by virtue of any such judgment, &c., and whose writ or other process of execution shall be duly registered, shall be entitled, while the registry of such writ, &c. shall continue in force, to obtain from the Court of Chancery upon petition in a summary way an order for the sale of his debtor's interest in such land.

It is provided by the 5th section, that if it shall appear on making inquiries that any other debt due on any judgment, &c. is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the order for sale, and shall after such order be bound thereby; and he is to be at liberty to attend the proceedings, and the proceeds of the sale are to be distributed among the persons who may be found entitled thereto, according to their priorities.

The 6th section provides, that every person claiming any interest in such land through or under the debtor by any means subsequently to the delivery of such land

in execution, shall be bound by every such order of sale.

The following are some of the points which have been decided with reference to judgments as a charge upon real property:—

A purchaser is not bound to search for registered judgments (*h*).

A judgment creditor, who has acquired the legal seisin and possession of land under an elegit, will not prevail against a prior equitable mortgage of which he has no notice (*i*).

If a judgment be entered up against a vendor after a contract for sale, it will be a charge on the unpaid purchase-money, and if entered up against a mortgagor subsequently to the mortgage, it is a charge upon the surplus proceeds of sale in the hands of a mortgagee, who must apply the same in discharge of all payments of which he has notice (*k*); and a trustee for sale of real property cannot safely pay the proceeds of sale to a debtor as against the debt of a judgment creditor (*l*).

Judgments have been held not to be charges upon ecclesiastical livings (*m*).

A purchaser who becomes such within five years from the registering of a judgment remains affected by it,

(*h*) *Lane v. Jackson*, 20 Beav. 535.

(*i*) *Whitworth v. Gaugain*, 1 Phil. 728.

(*k*) *Thornton v. Finch*, 4 Gif. 504.

(*l*) *Thomas v. Cross*, 11 Jur. 384; see also *Thornton v. Finch*, 4 Gif. 505.

(*m*) *Batts v. Brothers*, 2 Sm. & Gif. 509; *Hawkins v. Gathercole*, 6 De G., M. & G. 1.

though it is not subsequently re-registered (*n*). If such purchaser sells again after the expiration of the five years the second purchaser is not affected, a search for five years being sufficient in all cases (*o*).

The priorities of judgment creditors are not determined by the date of the judgment, but by the time at which the writs of execution issued thereon are placed in the hands of the sheriff (*p*).

To bring equitable interests in land within the 1st section of 27 & 28 Vict. c. 112, application must be made to the Court to remove the impediment which will exist by reason of the legal estate being outstanding, and, until this is done, the execution creditor will not have any charge on the land (*q*), though an execution creditor is not bound to redeem prior incumbrances, but may obtain a decree for sale, making the subsequent incumbrancers parties (*r*).

Before quitting the subject of registered judgments it should be remarked, that, as to judgments entered up prior to the act of 27 & 28 Vict., a purchaser without notice is unaffected thereby, so far as the extended remedies of the statutes of the present reign are concerned, even though the judgment be registered and re-registered, but such purchaser will be affected under

(*n*) *Beavan v. Earl of Oxford*,
6 De G., M. & G. 492.

(*o*) *Benham v. Keen*, 1 John. &
Hem. 685.

(*p*) *Guest v. Cowbridge Rail. Co.*,
L. R., 6 Eq. 619.

(*q*) *Hatton v. Haywood*, L. R.,
9 Ch. 229; *Beckett v. Buckley*, L.
R., 17 Eq. 437; *Re South*, L. R.,
9 Ch. 369.

(*r*) *Wells v. Kilpin*, L. R., 18
Eq. 298.

such judgment to the same extent as he would have been under the old law (s).

Where land purchased is in a register county, a search for judgments in the Common Pleas registry will be sufficient, as judgments registered in the local registry alone do not affect purchasers and mortgagees, either with or without notice. A purchaser should not, however, rely upon his own want of notice but search the registries, as on a re-sale the purchaser from him might search the registries and find judgments, which, but for want of notice, would have affected the title to the property sold, and if such judgments had been duly re-registered it would be difficult to prove the want of notice.

The search should be made immediately before completion and carried back for five years. Although, as it has been seen, judgments entered up after the 29th of July, 1864, need not be registered, still judgments entered up before that time and re-registered will continue to bind the property.

Search should also be made for executions issued and registered since the 29th July, 1864.



SECTION 4.

Crown Debts.

By the 2 & 3 Vict. c. 11, s. 8, it is enacted, that no judgment, &c. thereafter to be obtained or entered into

(s) *Prid. Con.*, tit. "Search for Incumbrances;" 2 & 3 Vict. c. 11, s. 5.

in the name or upon account of her Majesty, or inquisition by which any debt should be found due to her Majesty, or any obligation or specialty thereafter to be made, or any acceptance of office thereafter to be accepted by officers whose lands should thereby become liable for the payment of arrearages under the act of the 13 Eliz. c. 4, shall affect any lands, &c. as to purchasers or mortgagees until a memorandum containing the particulars thereby provided is left with the senior master of the Court of Common Pleas, who shall forthwith enter the same particulars in a book to be intituled "The Index to Debtors and Accountants to the Crown." But any two (*t*) of the Commissioners of the Treasury are empowered, upon such terms as they may think proper, to certify by writing under their hands that any lands of any crown debtor or accountant to the crown shall be held by the purchaser or mortgagee thereof discharged from all further claims of her Majesty, her heirs or successors, in respect of any debt or liability of the debtor or accountant to whom such land belonged (*u*). And a similar power has more recently been given to any two of the commissioners or other principal officers of any public department, with respect to any crown bond or other security concerning or incident to any such department, or if there be only one such commissioner or officer, then the power is vested in him (*x*).

By the 22 & 23 Vict. c. 35, s. 22, it is provided,

(*t*) 12 & 13 Vict. c. 89.

(*x*) 16 & 17 Vict. c. 107, ss. 195,

(*u*) 2 & 3 Vict. c. 11, s. 10.

197; 23 & 24 Vict. c. 115, s. 1.

that from and after the 31st December, 1859, the provision for the re-registry of judgments, &c. contained in the 2 & 3 Vict. c. 11, as explained and amended by the 18 & 19 Vict. c. 15, shall extend to every judgment, &c. as, by sect. 8 of the 2 & 3 Vict. c. 11, is required to be registered; thus rendering it obligatory on the crown, in order to bind the lands, &c. of its debtors or accountants as against purchasers, mortgagees or creditors becoming such after the 31st December, 1859, to register in like manner as is necessary in the case of a private person, and so that notice of any such judgment, &c. not duly registered shall not avail against purchasers, mortgagees or creditors becoming such after the 31st December, 1859, as to lands, &c.: and this provision shall apply to every such judgment, &c. as, since the passing of the 2 & 3 Vict. c. 11, has been registered under the provisions therein contained or shall thereafter be so registered.

The 28 & 29 Vict. c. 104, s. 48, enacts, as to crown debts dated subsequently to the 5th of July, 1865, that any judgment, &c. obtained after that date by or on behalf of the crown, or any obligation or specialty made after that date to the crown, or any acceptance of office accepted after that date from or under the crown, shall not affect any lands as to a *bonâ fide* purchaser or mortgagee, whether he has notice or not, unless an extent or other process of execution is issued and registered before the execution of the conveyance, &c., and the payment of the mortgage or purchase-money.

Section 49 prescribes the mode of registration of the writ or other process in the Court of Common Pleas.

And where property is situate in a palatine county, the palatine Court of Common Pleas should be searched as also the Court of Common Pleas at Westminster, as the acts of 1 & 2 Vict. c. 110 (*y*), and 18 & 19 Vict. c. 15 (*z*), provide for the registration and re-registration of judgments, &c. in the Courts of Common Pleas of these counties, in the same manner as is provided with reference to the courts at Westminster, in order to affect lands within the jurisdiction of such palatine courts.



SECTION 5.

Annuities.

Annuities and rent-charges are incumbrances, a record of which has been provided by the legislature, and which should be searched before completion of the purchase.

This species of charge upon property was more frequent than at present, when the usury laws were in force; and being resorted to for the purpose of evading them was made the subject of several very stringent legislative enactments (*a*), which have now been repealed (*b*). The registration of deeds creating annuities and rent-charges is now regulated by a recent act of parliament (*c*), which provides that any annuity or

(*y*) Sect. 21.

c. 92; 7 Geo. 4, c. 75.

(*z*) Sects. 1, 2, 3, 7, 9.

(*b*) 17 & 18 Vict. c. 90.

(*a*) 53 Geo. 3, c. 141; 3 Geo. 4,

(*c*) 18 & 19 Vict. c. 15.

rent-charge granted after the passing of the act otherwise than by marriage settlement for one or more life or lives, or for any term of years or greater estate determinable on a life or lives, shall not affect any lands, &c. as to purchasers, mortgagees or creditors unless and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument or assurance whereby the annuity or rent-charge is granted, and the annual sum or sums to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order, by the name of the person whose estate is to be affected (*d*).

It is also enacted, that the provisions of the act are not to extend to annuities or rent-charges given by will (*e*).



SECTION 6.

Lis pendens.

The 2 & 3 Vict. c. 11, s. 7, provides, that no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade or profession

(*d*) 18 & 19 Vict. c. 15, s. 12.

(*e*) *Id.*

of the person whose estate is intended to be affected thereby, and certain other particulars, shall be left with the senior master of the Court of Common Pleas, who shall enter the same in a book in alphabetical order by the name of the person whose estate is intended to be affected.

The provisions for re-registering judgments every five years also extend to *lis pendens*.

It will be observed that notice of a pending suit will be effectual even though the suit be not registered as provided for by the act, and a person purchasing during the pendency of a suit which relates to the subject of his purchase will be bound by a decree made against the person through whom he derives title, whether he has notice of the pending proceedings or not (*f*); but the suit must be pending, as a decree will not be deemed implied notice to a purchaser after the cause is ended (*g*), and the purchaser will only be bound by rights ascertained in the suit affecting the estate purchased by him (*h*).

A purchaser cannot refuse to complete his purchase by reason of a pending suit, if the claim in respect of which the suit is instituted cannot be sustained, notice of a *lis pendens* not being of necessity an incumbrance, but simply notice of a claim (*i*).

(*f*) *Bishop of Winchester v. Paine*, 11 Ves. 194.

(*g*) *Kinsman v. Kinsman*, 1 R. & M. 617.

(*h*) *Worsley v. Earl of Scar-*

borough, 3 Atk. 391; *Bellamy v. Sabine*, 1 De G. & Jones, 584;

Tyler v. Thomas, 25 Beav. 47.

(*i*) *Bull v. Hutchons*, 9 Jur. 954.

Searches for judgments, executions, crown debts, annuities, and *lis pendens* are now made in the Central Office of the Supreme Court of Judicature; and section 2 of the Conveyancing Act, 1882, provides, that persons requiring, for the purposes of that section, search to be made in such office for entries of judgments, deeds, or other matters or documents whereof entries are required or allowed to be made in that office, may deliver in the office a requisition in that behalf referring to that section, whereupon the search required shall be made and a certificate of the result thereof made and filed in the office. Office copies of which, issued on requisition, shall be evidence of the certificate, but nothing in the section or in any rule made thereunder shall prejudicially affect the right which any person may have independently thereof to make any search in the office as heretofore.

This section does not extend to Ireland, as it introduces into this country a practice which has long been established there, not only with regard to incumbrances registered in the High Court, but to those registered in the deeds registry there, a registry similar to the local registries here, but which extends to the whole of that country.

SECTION 7.

Remedies for Breach of Contract.

In case a purchaser refuses to complete his purchase, the vendor may either insist upon the contract being

carried out, or bring an action for the damages sustained by its non-performance; but in either case he must show that he can deduce a good title according to the contract, and that he is ready and willing to execute a conveyance (*k*).

The purchaser may in like manner compel a specific performance, or bring his action for damages, if the vendor refuses to complete; but he should previously tender a conveyance and the purchase-money to the vendor, unless the vendor has discharged him from so doing (*l*); and the conveyance or assurance tendered must be in such form as the vendor is bound under the terms of the contract to execute (*m*). But if the vendor refuse to furnish or verify the abstract, or fail to show a good title (*n*), or have placed himself in such a position as to be unable to complete the purchase, the tender will be rendered unnecessary (*o*).

The measure of damages recoverable by a vendor for breach of contract for sale of land will be the difference between the value of the land at the time the contract ought to have been completed and the date of the breach (*p*).

(*k*) *Poole v. Hill*, 6 M. & W. 835; *Perry v. Smith*, 1 Car. & M. 554; *Laird v. Pim*, 7 M. & W. 474.

(*l*) *Knight v. Crockford*, 1 Esp. 189; *Poole v. Hill*, 6 M. & W. 835; *Lovelock v. Franklin*, 8 Q. B. 371.

(*m*) *Manning v. Bailey*, 2 Ex. 45.

(*n*) *Thames Haven Co. v. Brymer*, 5 Ex. 696; *Berry v. Young*, 2 Esp. 640, n.; *Clarke v. King*, 2 Car. & P. 286.

(*o*) *Caines v. Smith*, 15 M. & W. 189; *Short v. Stone*, 3 D. & L. 580.

(*p*) *Watkins v. Watkins*, 12 L. J., Ex. 352.

The measure of damages recoverable by a purchaser will be confined to the expenses which he may have incurred in the investigation of the title and proceeding to completion (*q*), including interest upon his deposit (*r*), and upon the balance of his purchase-money if lying idle (*s*); but he will not generally be entitled to any damages for the loss of the bargain (*t*), or for expenses incurred prior to the contract (*u*), or loss by selling out of the funds (*x*). This rule will not apply in the case of a lease granted by one who has no power to grant it; thus, where a tenant for life with power to grant leases in possession and not in reversion, granted a lease in reversion, receiving a premium, and died before the commencement of the term, it was held that the lessee was entitled to recover under the lessor's covenant for quiet enjoyment from the executor the amount of the premium paid for the void lease, as also the costs of preparing it, in addition to damages for breach of contract (*y*); and where the lessee of the use of an entrance, which he had acquired by arrangement with the person entitled in reversion to premises occupied by him, a portion whereof he had surrendered to them, was dis-

(*q*) *Hall v. Betty*, 5 Scott, N. R. 508.

(*r*) *Hodges v. Lord Lichfield*, 1 Bing., N. S. 492.

(*s*) *Sherry v. Oke*, 3 Dowl., P. C. 349.

(*t*) *Tyrer v. King*, 2 Car. & K. 149; *Flureau v. Thornhill*, 2 W. Bla. 1078; *Clare v. Maynard*, 6

Ad. & E. 519; *Bain v. Fothergill*, 7 L. R., H. L. 158.

(*u*) *Hodges v. Lord Lichfield*, 1 Bing., N. S. 492.

(*x*) *Flureau v. Thornhill*, 2 W. Bla. 1078.

(*y*) *Locke v. Furze*, 1 L. R., C. P. (Ex. Ch.) 441.

turbed in the enjoyment of such entrance, it was held he was entitled to such a measure of damages as amounted to the difference between the then present state of things and what it would have been if he had obtained a title to the entrance (s). In another case, where a person representing that he had authority from the owners of the estate, entered into a contract which they repudiated, it was held that the measure of damages recoverable against the person exceeding his authority was to include the difference between the contract and market price of the estate (a). So also where the vendor is aware at the time of entering into the contract that he has no title, or omits to take the necessary steps for putting the purchaser into possession, or the sale is not carried out in consequence of the vendor changing his mind, a purchaser would be entitled to damages for loss of the bargain (b).

Specific performance of the contract will be enforced at the instance of either vendor or purchaser, or those representing them in interest, if there be a contract valid at law, and such as, having regard to the circumstances, ought to be enforced (c),—if there be a good title according to the terms of the contract, and damages will not furnish a complete remedy, or if it would be inequit-

(s) *Wall v. The City of London Real Property Company*, 9 L. R., Q. B. 249.

(a) *Goodwin v. Francis*, 5 L. R., C. P. 295.

(b) *Simons v. Patchett*, 7 E. & B. 568; *Robinson v. Hardman*, 1 Exch. 850.

(c) *Blyth v. Elmsfirst*, 1 Ves. & B. 2.

able not to enforce it, but the agreement must be free from uncertainty and ambiguity (*d*). A bargain so unreasonable that hardship arises to a degree of inconvenience and absurdity so great that the court can judicially say that such could not be the meaning of the parties, will not be enforced (*e*); or where the contract is entered into under circumstances of mistake or surprise, unless the mistake does not materially affect the substance of the agreement (*f*). And an agent exceeding his authority in entering into a contract will be liable to the proposed purchaser for any money expended pursuant thereto which may become lost to the purchaser by reason of the principal refusing to carry out the contract (*g*).

Under certain circumstances a contract may be rescinded. The remedy is one in most cases resorted to by a purchaser in an action to recover the purchase-money or deposit, and generally arises where the vendor is unable to make a good title according to the contract, or where the contract has been entered into under a mistake materially affecting the subject-matter, or is affected by fraud or undue influence.

The Vendor and Purchaser Act, 1874 (*h*), provides that a purchaser of real or leasehold estate in England

(*d*) *Buxton v. Lister*, 3 Atk. 383; *Martin v. Mitchell*, 2 J. & W. 423.

(*e*) *Prebble v. Boghurst*, 1 Swans. 329; *Squire v. Baker*, 5 Vin. Ab. 349; *Kimberley v. Jennings*, 6 Sim. 352.

(*f*) *Mortlock v. Butler*, 10 Ves. 304; *Okill v. Whittaker*, 1 De G. & S. 83.

(*g*) *Spedding v. Nevill*, 4 L. R., C. P. 212.

(*h*) 37 & 38 Vict. c. 78.

or their representatives respectively may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract); and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid. A vendor or purchaser of real or leasehold estates in Ireland or their representatives respectively may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland; and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid (i).

It has been decided that on proceeding under this section of the act (i) the parties are in the same position as they would have been if the title had been referred on a suit for specific performance, and evidence by affidavit is therefore admissible (k).

(i) Sect. 9.

(k) *In re Burroughes*, 5 L. R., Ch. D. 378.

PART IV.

OF COMPLETION OF THE PURCHASE AND THE EFFECT THEREOF.

CHAPTER XIII.

EXECUTION OF ASSURANCE AND PAY- MENT OF PURCHASE-MONEY.

SECTION 1.

Payment of Purchase-money to Vendor's Solicitor.

UPON the title being accepted by the purchaser and the form of assurance agreed upon between the parties thereto, the purchase will be completed by execution of the purchase deed and payment of the purchase-money.

It is somewhat uncommon for the vendor personally to attend the completion of the purchase, but the purchaser, until the Conveyancing and Law of Property Act, 1881, came into operation, was nevertheless entitled to require the conveyance to be executed in the presence of his solicitor; but now it is provided by sect. 8, that on a sale the purchaser shall not be entitled to require that the conveyance to him be executed in his

presence or in that of his solicitor as such, but shall be entitled to have at his own cost the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor; and when the vendor was not present at completion to receive the purchase-money, the purchaser was entitled, notwithstanding the receipt upon the deed, to be furnished with a written request directed to him, and signed by the vendor for payment of the purchase-money to his solicitor; but now it is provided by sect. 56 of the act, that where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed or the indorsed receipt being signed by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay the same, for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

Where an agent is empowered to receive the purchase-money it cannot be set off against a debt due from him to the purchaser (a).

(a) *Young v. White*, 7 Beav. 506.

See re Bellamy Contract
L.R. 24 Ch. 8 387-

SECTION 2.

Execution of Assurance.

The parties in whom the estate is vested should themselves execute the assurance to the purchaser, or if the estate should be of copyhold tenure, surrender in person (b); and the purchaser is not bound to accept an execution under a power of attorney for which there is no necessity, and which may have been determined by reason of the death of the constituent (c); but the Conveyancing Act, 1882, s. 8, provides that a power of attorney is given for a valuable consideration, and expressed to be irrevocable, will not be revoked at any time, either by anything done by the donor without the consent of the donee, or by the death, marriage, lunacy, unsoundness of mind or bankruptcy of the donee; and sect. 9 provides for attaining the like effect, whether the power be given for a valuable consideration or not, where the instrument creating it expresses it to be irrevocable for a fixed time therein specified, not exceeding one year. The conveyance of a married woman's interest in real estate under a power of attorney was formally inoperative (d), but now the Conveyancing and Law of Property Act, 1881, s. 40, provides that a married woman, whether an infant or not, shall have power as if she were unmarried and of full age, by

(b) *Mitchell v. Neale*, 2 Ves. 679; *Noel v. Weston*, 6 Mad. 50. (d) *Graham v. Jackson*, 6 Q. B. 811.

(c) *Dart, V. & P.* 569.

deed to appoint an attorney on her behalf for the purpose of executing of any deed, or doing any other act which she might herself execute or do.

When the estate is of copyhold tenure and the wife of the vendor is entitled to freebench, she must join in the surrender to the purchaser after having been separately examined as to such surrender being voluntary on her part.

A mortgagee is not bound to reconvey before the time fixed for redemption (*e*), and he cannot be compelled to transfer by any other description than that under which the property was vested in him (*f*).

A trustee of outstanding legal estate must convey upon request of the party entitled to a conveyance, but he is not bound from time to time to convey different parcels of the trust estate (*g*).

Any one of several executors may, during the life of his co-executors, perform without their concurrence the ordinary acts of administration, and may accordingly alone make a valid assignment of a chattel interest in real estate (*h*). An assignment by an executor who dies before probate is granted to him is valid (*i*), but it is not so in the case of a person who is entitled to take out letters of administration but has not done so, even though he subsequently obtains a grant (*k*).

(*e*) *Brown v. Cole*, 14 Sim. 427. (*h*) *Simpson v. Gutteridge*, 1

(*f*) *Goodson v. Ellison*, 3 Russ. Mad. 609.

594. (*i*) *Brasier v. Hudson*, 8 Sim.

(*g*) *Hampshire v. Bradley*, 2 67.

Coll. 34. (*k*) *Wms. Exors.* 390.

When the sale is by trustees they must all join in the receipt for the purchase-money (*l*), and where a testator has contracted to sell, the purchase-money must be paid to his executor (*m*).

Incumbrances which would affect the property in the hands of a purchaser must be removed by the vendor or be paid out of the purchase-money, and any assignee of the unpaid purchase-money would take subject to the purchaser's right in this respect (*n*), and until completion of the purchase the vendor will remain liable for all defects (*o*). The Conveyancing and Law of Property Act, 1881, s. 5, provides:—

“5.—(1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court

(*l*) Sugd. V. & P. 664.

(*m*) *Eaton v. Sanster*, 5 Sim.

517.

(*n*) *Lacey v. Ingle*, 2 Phill. 413;

Greenwood v. Taylor, 14 Sim. 505.

(*o*) *Dart*, V. & P. 591.

considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount.

(2) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(3) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4) This section applies to sales not completed at the commencement of this act, and to sales thereafter made."

Upon the assurance being delivered to the purchaser it will be necessary to consider if anything remains to complete his title to the property purchased and the evidence thereof, and the first thing which will suggest itself will probably be the stamp duties; which are treated of in the following chapter.

CHAPTER XIV.

STAMP DUTIES.

By the Stamp Act, 1870 (*a*), conveyances or transfers upon sale of any property (except the stock of the Governor and Company of the Bank of England, East India Stock or any debenture stock or funded debt of any company or corporation) are chargeable with the following duties:—

						£ s. d.		
Where the amount or value of the consideration for the								
sale does not exceed £5						0	0	6
Exceeds £5 and does not exceed £10						0	1	0
„	10	„	„	15	.. .. .	0	1	6
„	15	„	„	20	.. .. .	0	2	0
„	20	„	„	25	.. .. .	0	2	6
„	25	„	„	50	.. .. .	0	5	0
„	50	„	„	75	.. .. .	0	7	6
„	75	„	„	100	.. .. .	0	10	0
„	100	„	„	125	.. .. .	0	12	6
„	125	„	„	150	.. .. .	0	15	0
„	150	„	„	175	.. .. .	0	17	6
„	175	„	„	200	.. .. .	1	0	0
„	200	„	„	225	.. .. .	1	2	6
„	225	„	„	250	.. .. .	1	5	0
„	250	„	„	275	.. .. .	1	7	6
„	275	„	„	300	.. .. .	1	10	0
„	300.							

For every £50 and also for every fractional part of
£50 of such amount or value 0 5 0

(*a*) 33 & 34 Vict. c. 97.

The term conveyance on sale includes every instrument and every decree or order of any court or of any commissioners, whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction (b).

Where the consideration or any part of the consideration for a conveyance on sale consists of stock or any marketable security, such conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon such security (c).

Where the consideration or any part of the consideration for a conveyance on sale consists of any security not being a marketable security, such conveyance is to be charged with *ad valorem* duty in respect of the amount due on the day of the date thereof for principal and interest upon such security (c).

Where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically for a definite period, so that the total amount to be paid can be previously ascertained, such conveyance is to be charged in respect of such consideration with *ad valorem* duty on such total amount (d).

Where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically in perpetuity or for any indefinite period not

(b) 33 & 34 Vict. c. 97, s. 70.

(c) *Id.* s. 71.

(d) *Id.* s. 72.

terminable with life, such conveyance is to be charged in respect of such consideration with *ad valorem* duty on the total amount which will or may according to the terms of sale be payable during the period of twenty years next after the day of the date of such instrument (e).

Where the consideration or any part of the consideration for a conveyance on sale consists of money payable periodically during any life or lives, such consideration is to be charged in respect of such consideration with *ad valorem* duty on the amount which will or may according to the terms of sale be payable during the period of twelve years next after the day of the date of such instrument (e).

Provided that no conveyance on sale chargeable with *ad valorem* duty in respect of any periodical payments, and containing also provision for securing such periodical payments, is to be charged with any duty whatsoever in respect of such provision, and no separate instrument made in any such case for securing such periodical payments is to be charged with any higher duty than ten shillings (e).

Where any property is conveyed to any person in consideration wholly or in part of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, such debt, money or stock is to be deemed the

(e) 33 & 34 Vict. c. 97, s. 72.

whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with *ad valorem* duty (*f*).

Where any property has been contracted to be sold for one consideration for the whole and is conveyed to the purchaser in separate parts or parcels by different instruments, the consideration is to be apportioned in such manner as the parties think fit, so that a distinct consideration for each separate part or parcel is set forth in the conveyance relating thereto, and such conveyance is to be charged with *ad valorem* duty in respect of such distinct consideration (*g*).

Where property contracted to be purchased for one consideration for the whole by two or more persons jointly, or by any person for himself and others or wholly for others, is conveyed in parts or parcels by separate instruments to the persons by or for whom the same was purchased for distinct parts of the consideration, the conveyance of each separate part or parcel is to be charged with *ad valorem* duty in respect of the distinct part of the consideration therein specified (*g*).

Where a person having contracted for the purchase of any property, but not having obtained a conveyance thereof, contracts to sell the same to any other person, and the property is in consequence conveyed immediately to the sub-purchaser, the conveyance is to be charged with *ad valorem* duty in respect of the con-

(*f*) 33 & 34 Vict. c. 97, s. 73.

(*g*) *Ib.* s. 74.

sideration for the sale by the original purchaser to the sub-purchaser (*h*).

Where a person having contracted for the purchase of any property, but not having obtained a conveyance, contracts to sell the whole or any part or parts thereof to any other person or persons, and the property is in consequence conveyed by the original seller to different persons in parts or parcels, the conveyance of each part or parcel is to be charged with *ad valorem* duty in respect only of the consideration moving from the sub-purchaser thereof, without regard to the amount or value of the original consideration (*i*).

Where a sub-purchaser takes an actual conveyance of the interest of the person immediately selling to him, which is chargeable with *ad valorem* duty in respect of the consideration moving from him and is duly stamped accordingly, any conveyance to be afterwards made to him of the same property by the original seller shall be exempt from the said *ad valorem* duty, and chargeable only with the duty to which it may be liable under any general description, but such last-mentioned duty shall not exceed the *ad valorem* duty (*j*).

Where, upon the sale of an annuity or other right not before in existence, such annuity or right is not created by actual grant or conveyance, but is only secured by bond, warrant of attorney, covenant, contract or otherwise, the bond or other instrument, or some or one of such instruments, if there be more than one, is to be

(*h*) 33 & 34 Vict. c. 97, s. 74.

(*i*) *Id.*

(*j*) *Id.*

charged with the same duty as an actual grant or conveyance, and is, for all the purposes of this act, to be deemed an instrument of conveyance on sale (*k*).

Where there are several instruments of conveyance for completing the purchaser's title to the property sold, the principal instrument of conveyance only is to be charged with *ad valorem* duty, and the other instruments are to be respectively charged with such other duty as they may be liable to; but such last-mentioned duty shall not exceed the *ad valorem* duty payable in respect of the principal instrument (*l*).

In the cases below specified the principal instrument is to be ascertained in the following manner:—

When any copyhold or customary estate is conveyed by a deed, no surrender being necessary, the deed is to be deemed the principal instrument.

In other cases of copyhold or customary estates, the surrender or grant, if made out of court, or the memorandum thereof and the copy of court roll of the surrender or grant, if made in court, shall be deemed the principal instrument.

Where in Scotland there is a disposition or assignation executed by the seller, and any other instrument is executed for completing the title, the disposition or assignation is to be deemed the principal instrument.

In any other cases the parties may determine for themselves which of several instruments is to be deemed

(*k*) 33 & 34 Vict. c. 97, s. 75.

(*l*) *Id.* s. 76.

the principal instrument, and may pay the *ad valorem* duty thereon accordingly (m).

A conveyance or transfer of any kind, not otherwise described in the act, is chargeable with the duty of ten shillings.

Every instrument and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is chargeable with duty as a conveyance or transfer of property, provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than ten shillings (n).

Instruments relating to a sale of copyhold or customary hereditaments are chargeable with the same duty as a conveyance on sale, and upon any other occasion of a surrender or grant made out of court, or the memorandum thereof or a copy of court roll of any surrender or grant made in court, a duty of ten shillings is payable.

The copy of court roll of a surrender or grant made out of court shall not be admissible or available as evidence of the surrender or grant, unless the surrender or grant or the memorandum thereof is duly stamped, of which fact the certificate of the steward of the manor on the face of such copy shall be sufficient evidence (o).

The entry upon the court rolls of a surrender or grant shall not be admissible or available as evidence of the

(m) 33 & 34 Vict. c. 97, s. 77.

(n) *Ib.* s. 78.

(o) *Ib.* s. 81.

surrender or grant, unless the surrender or grant, if made out of court, or the memorandum thereof or the copy of court roll of the surrender or grant, if made in court, is duly stamped, of which fact the certificate of the steward of the manor in the margin of such entry shall be sufficient evidence (*p*).

No instrument is to be charged more than once with duty by reason of relating to several distinct tenements, in respect whereof several fines and fees are due to the lord or steward of the manor (*q*).

All the facts and circumstances affecting the liability to *ad valorem* duty of the copy of court roll of any surrender or grant made in court, or the amount of *ad valorem* duty with which any such copy of court roll is chargeable, are to be fully and truly stated in a note to be delivered to the steward of the manor before the surrender or grant is made (*r*).

The steward of every manor shall refuse to accept in court any surrender, or to make in court any grant, until such a note as is required by the last preceding section has been delivered to him, or to enter on the court rolls any presentment of or admit any person to be tenant under or by virtue of any surrender or grant made out of court, or any deed which is not duly stamped (*s*).

The steward of every manor shall, within four months from the day on which any surrender or grant is made in court, make out a duly stamped copy of court roll of

(*p*) 33 & 34 Vict. c. 97, s. 81.

(*q*) *Ib.* s. 82.

(*r*) *Ib.* s. 83.

(*s*) *Ib.* s. 84.

such surrender or grant, and have the same ready for delivery to the person entitled thereto, and if he neglects so to do shall forfeit the sum of 50*l.*, and the duty payable in respect of such copy of court roll shall be a debt to her Majesty, her heirs or successors, from such steward, whether he shall have received it or not, to be recoverable as therein mentioned, and the same shall also be a debt to her Majesty, her heirs or successors, from the party entitled to such copy (*t*).

The steward of any manor may, before he accepts in court any surrender or makes in court any grant, demand and insist on the payment of his lawful fees in relation to the surrender or grant, together with the duty payable on the copy of court roll thereof, and may refuse to proceed in any such matter, or to deliver such copy of court roll to any person, until such fees and duty are paid (*u*).

Any separate deed of covenant (not being an instrument chargeable with *ad valorem* duty as a conveyance on sale or mortgage) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of or the title to the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid, where the *ad valorem* duty in respect of the consideration or mortgage money does not exceed ten shillings, is chargeable with a duty equal to the amount of such *ad valorem* duty, and in any other case with a duty of ten shillings.

(*t*) 33 & 34 Vict. c. 97, s. 85.

(*u*) *Ib.* s. 86.



CHAPTER XV.
REGISTRATION, &c.

SECTION 1.

Contents of Memorial.

UPON the assurance being stamped, if it is subject to any of the local Registration Acts, to which reference has been made, a memorial thereof should be registered as early as possible.

The memorial should contain—

The date of the deed, with the names and descriptions of the parties thereto, and of the witnesses to the deed, with the places of their abode.

The description of the parcels contained in the operative part of the deed should in all cases be set out in the memorial, and also that contained in any recital to which the operative part of the deed has reference.

An indorsement should be described as such, and the parties' descriptions should be taken from the deed upon which it is indorsed, and a reference given to the registry thereof. The operative words of indorsement should be set out fully, inserting after them the following words: "And which premises are in the therein within written indenture described to be situate in the parish of in the county of ."

SECTION 2.

Execution of Memorial.

Memorials must be under the hand and seal of some or one of the grantors, or some or one of the grantees, his or their heirs, executors or administrators, guardians, or trustees, attested by two witnesses, one whereof to be one of the witnesses to the execution of the deed, which witness must upon oath before the registrars, or before a commissioner to administer oaths, prove the execution of the memorial and the deed.

The Stamp Act, 1870 (*a*), provides, that where the instrument registered is chargeable with any duty not amounting to 2*s.* 6*d.*, the memorial shall be charged with the same duty as the registered instrument.

In any other case 2*s.* 6*d.*

Re-execution of the deed for the purpose of registration is not admissible (*b*).

If the vendor should be a tenant in tail, the assurance must be enrolled in the Court of Chancery pursuant to 3 & 4 Will. 4, c. 74.



SECTION 3.

Inrolment in Chancery.

The Statute of Charitable Uses (*c*) provides that no lands or hereditaments, nor any money, stock or other

(*a*) 33 & 34 Vict. c. 97.

C. C. 620.

(*b*) *Essex v. Bough*, 1 Y. & C.

(*c*) 9 Geo. 2, c. 36.



personal estate to be laid out in the purchase of any lands or hereditaments, shall be conveyed or settled for any charitable uses unless by deed indented, sealed and delivered in the presence of two or more credible witnesses twelve calendar months at least before the death of the donor or grantor, including the days of the execution and death, and inrolled in the High Court of Chancery within six calendar months next after the execution thereof, and unless such stock be transferred six calendar months at least before the death of the donor or grantor, including the days of the transfer and death, and unless the same be made to take effect in possession for the charitable use intended immediately from the making thereof and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever for the benefit of the donor or grantor, or of any person or persons claiming under him (*d*) ; provided always, that nothing thereinbefore mentioned relating to the sealing and delivery of any deed twelve calendar months at least before the death of the grantor, or to the transfer of any stock six calendar months before the death of the grantor, shall extend to any purchase of any estate or interest in lands or hereditaments, or any transfer of stock to be made really *bonâ fide* for a full and valuable consideration actually paid at or before the making of such conveyance or transfer without fraud or collusion (*e*).

The Act to amend the Law relating to the Convey-

(*d*) 9 Geo. 2, c. 36, s. 1.

(*e*) *Ib.* s. 2.

ance of Land for Charitable Uses (*f*), which was passed on the 17th of May, 1861, provides that no assurance for charitable uses shall be void by reason of the deed or assurance not being indented or not purporting to be indented, nor by reason of such deed or assurance, or any deed forming part of the same transaction, containing any grant or reservation of any peppercorn or other nominal rent, or of any mines or minerals or easement, or any covenants or provisions as to the erection, repair, position, or description of buildings, the formation, or repair of streets or roads, drainage or nuisance, or any covenants or provisions of the like nature for the use and enjoyment as well of the hereditaments comprised in such deed or assurance as of any other adjacent or neighbouring hereditaments, or any right of entry on non-payment of any such rent, or on breach of any such covenant or provision or any stipulations of the like nature for the benefit of the donor or grantor or of any person or persons claiming under him, nor, in the case of copyholds, by reason of the assurance not being made by deed, nor, in the case of such assurances made *bonâ fide* on a sale for a full and valuable consideration, by reason of such consideration consisting wholly or partly of a rent, rent-charge or other annual payment reserved or made payable to the vendor or to any other person with or without a right of re-entry for non-payment thereof; provided that in all reservations authorized by the act, the donor,

(*f*) 24 Vict. c. 9.

grantor or vendor shall reserve the same benefits for his representatives as for himself (*g*).

It is also provided that in all cases where the charitable uses of any deed or assurance thereafter to be made for conveyance of any hereditaments for any charitable uses shall be disclosed by any separate deed, the deed of conveyance need not be inrolled, but it will be void unless such separate deed be inrolled in Chancery within six calendar months next after the making or perfecting of the deed for conveyance (*h*).

It has also been provided that all money really and *bonâ fide* expended before the 16th May, 1862, in the substantial and permanent improvement, by building or otherwise, for any charitable use, shall be deemed equivalent to money actually paid by way of consideration for the purchase of the said land (*i*).

It has also been enacted, that every full and *bonâ fide* valuable consideration which shall consist either wholly or in part of a rent or other annual payment reserved or made payable to the vendor or grantor, or to any other person, shall, for the purposes of the Mortmain Act, be as valid and have the same force and effect as if such consideration had been a sum of money actually paid at or before the making of such conveyance without fraud or collusion (*k*).

Every deed or assurance by which any land shall have been demised for any term of years for any chari-

(*g*) 24 Vict. c. 9, s. 1.

(*i*) 25 Vict. c. 17, s. 5.

(*h*) *Ib.* s. 2.

(*k*) 27 Vict. c. 13, s. 4.

table use shall, for the purposes of the Mortmain Act, be deemed to have been made to take effect, for the charitable use thereby intended, immediately from the making thereof, if the term for which such land shall have been thereby demised was made to commence and take effect in possession at any time within one year from the date of such deed or assurance (*l*); and with respect to all deeds and assurances under which possession is held for any charitable uses, that if made *bonâ fide* for a full and valuable consideration, actually paid at or before the making of such deed or assurance, or reserved by way of rent-charge or other annual payment, or partly paid and partly so reserved, no such deed or assurance shall be void within the Mortmain Act if it was made to take effect in possession for the charitable uses intended immediately from the making thereof and without any power of revocation, and has been or shall be inrolled in the Court of Chancery before the 17th of May, 1866 (*m*); and conveyances for charitable uses may now be inrolled where omission to inrol in proper time has arisen through ignorance or inadvertence (*n*).

By a recent statute (*o*) gifts and bequests may now be made of land of any tenure or personal estate to be laid out in the purchase of land for a public park or school-house, for an elementary school and a public

(*l*) 26 & 27 Vict. c. 106.

(*n*) 35 & 36 Vict. c. 24, s. 13.

(*m*) 24 Vict. c. 9, s. 3; 27 Vict.

(*o*) 34 & 35 Vict. c. 13.

c. 13, s. 1.

museum; but the act does not permit more than twenty acres for a park, nor two for a museum, nor one for a school, to be given by will, and every deed or will containing such a gift (otherwise than for full and valuable consideration) must be made twelve calendar months at least before the death of the grantor or testator, and inrolled in the books of the Charity Commissioners within six calendar months next after the time when the will or deed shall come into operation (*p*).

With reference to land already in mortmain, no special attestation or inrolment is required on its transfer to new trustees or to another charity (*q*). The acknowledgment of deeds prior to inrolment is now abolished (*r*).



SECTION 4.

Inrolment of Assurances of Crown Lands.

The conveyances or assurances of crown lands, when inrolled in the office of land revenue records and inrolments, are exempt from inrolment in courts of law or equity, or registration in any local registry (*s*).

(*p*) 34 & 35 Vict. c. 13, s. 5.

(*r*) 31 & 32 Vict. c. 44, s. 3.

(*q*) *Walker v. Richardson*, 2

(*s*) 53 Geo. 3, c. 121; 2 Will. 4;

Mee. & Wels. 882; *Ashton v.* c. 1; 16 & 17 Vict. c. 56, s. 6.
Jones, 28 Beav. 460.



SECTION 5.

Notice.

It should also be considered whether there are any persons to whom notice of the execution of the assurance should be given.

On the purchase of an equitable estate notice should be given to the persons having the legal estate, particularly in the case of an equity of redemption, to prevent further advances being made by the mortgagee to the mortgagor (*t*).

And on taking an assignment of leaseholds the lease should be carefully perused, in order to ascertain if there is any provision requiring notice thereof to be given to the lessor.



SECTION 6.

As to Right of Purchasers to Benefit of Rent and Covenants.

When property is purchased subject to a lease under seal (*u*), the purchaser is entitled to the benefit of the lessee's covenants with the vendor, and may recover in respect of any breach thereof before conveyance if he has the reversion during the existence of the term, but

(*t*) *Blackston v. Morland*, 2 Ch. Ca. 20; *Goddard v. Complin*, 1 Ch. Ca. 119. (*u*) *Standen v. Christmas*, 10 Q. B. 135.

he cannot recover if the conveyance is made after the expiration of the term (*v*).

Where the lease is not under seal, the right to sue thereon does not pass to the purchaser, and the vendor may after the conveyance sue thereunder for breach committed during the tenancy, even though subsequent to the conveyance, but the purchaser may maintain assumpsit against the tenant for use and occupation (*w*).

When a tenancy is current at the execution of the conveyance, the purchaser becomes entitled to the rent then accruing due (*x*), and the purchaser may recover such rent, as also any future rent, by action or distress if he has given notice of his conveyance to the tenant (*y*); but in the absence of notice the purchaser cannot recover rent which the tenant may have paid to the vendor whilst unaware of the conveyance (*z*).

A proportionate part of a rent-charge may be distrained for by a purchaser thereof (*a*).

The Conveyancing and Law of Property Act, 1881, contains the following provisions upon the subject treated of, under sections:—

“10.—(1) Rent reserved by a lease, and the benefit

(*v*) Sugd. V. & P. 181.

(*w*) Dart, V. & P. 814; *Bickford v. Parsons*, 5 C. B. 920; *Standen v. Christmas*, 10 Q. B. 135.

(*x*) *Flight v. Bentley*, 7 Sim. 149.

(*y*) *Moss v. Gallimore*, Doug. 259; *Middleton v. Barnett*, 2 Bing. N. C. 538.

(*z*) *Flight v. Bentley*, 7 Sim. 149; *Birch v. Wright*, 1 T. R. 385.

(*a*) *Rivis v. Watson*, 5 M. & W. 255.

of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessees part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

“(2) This section applies only to leases made after the commencement of this act.

“11.—(1) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be

taken advantage of and enforced against any person so entitled.

“(2) This section applies only to leases made after the commencement of this act.

“**12.**—(1) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

“(2) This section applies only to leases made after the commencement of this act.

“**13.**—(1) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

“(2) This section applies only if and as far as a contrary intention is not expressed in the contract, and

shall have effect subject to the terms of the contract and to the provisions therein contained.

“(3) This section applies only to contracts made after the commencement of this act.”



SECTION 7.

Apportionment Act.

The Apportionment Act (c), which came into operation on the 16th June, 1834, enacts that from and after the passing of the act, all rent service reserved on any lease by a tenant in fee or for any life interest, or by any lease granted under any power (and which leases shall have been granted after the passing of the act), and all other rents made payable or becoming due at fixed periods under any instrument that shall be executed after the passing of the act, or (being a will or testamentary instrument) that shall come into operation after the passing of the act, shall be apportioned in such manner that on the death of any person interested therein or on the determination by any other means whatsoever of the interest of any such person, he or she, or his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, &c., according to the time which shall have elapsed from the last period of payment thereof respectively, including the

(c) 4 Will. 4, c. 22.

day of the death of such person or the determination of his or her interest (*d*), unless it shall be expressly stipulated that no apportionment shall take place (*e*).

The act did not, however, appear as between vendor and purchaser to affect the right of the latter to accruing rents (*f*); but it is now provided by the Apportionment Act, 1870 (*g*), that after the 1st of August, 1870, all rents and other periodical payments in the nature of income should be considered as accruing from day to day and be apportionable accordingly (*h*).



SECTION 8.

Lien for unpaid Purchase-Money.

Notwithstanding the execution of the conveyance and delivery of possession, and though such conveyance may have a receipt for the purchase-money indorsed thereon, the vendor retains an equitable lien on the estate for the whole or any part of the purchase-money remaining unpaid, and a sub-purchaser or mortgagee will be postponed even without notice, unless he has the legal estate (*i*). The title deeds may also be recovered by the purchaser at law after conveyance of the estate, even though the purchase-money be unpaid,

(*d*) 4 Will. 4, c. 22, s. 2.

(*g*) 33 & 34 Vict. c. 35.

(*e*) *Ib.* s. 3.

(*h*) *Ib.* s. 2.

(*f*) *Re Markby*, Myl. & Cra.
484; *Browne v. Amyot*, 3 Ha. 173.

(*i*) Dart, V. & P. 730; *Mack-
reth v. Simmons*, 15 Ves. 329.

unless the conveyance be executed as an escrow to be delivered on payment of the money (*k*).

The lien is generally lost, however, by taking an independent security for payment (*l*); but it will not be lost by the vendor taking a bond, bill of exchange, or promissory note, or other security which merely evidences or facilitates payment, even though a surety join therein (*m*).

If the interest be miscalculated, the vendor cannot bring an action for the amount omitted to be paid (*n*).

SECTION 9.

Inadequate Consideration.

After conveyance the vendor will have no remedy if the property prove more valuable than it was supposed to be either in quantity or extent (*o*), unless the conveyance by mistake comprises more than either party intended to deal with (*p*), or the vendor in fixing the price may have relied upon information furnished by the purchaser which was materially incorrect (*q*). But

(*k*) *Goode v. Burton*, 1 Exch. 189; *Austin v. Croome*, 1 Car. & M. 653; *Harrington v. Price*, 3 B. & Ad. 170.

(*l*) *Nairn v. Prowse*, 6 Ves. 752; *Capper v. Spottiswoode*, Toml. 21; *Bond v. Kent*, 2 Vern. 281.

(*m*) *Dart, V. & P.* 733.

(*n*) *Harding v. Ambler*, 3 M. & N. 279.

(*o*) *Okill v. Whittaker*, 2 h. 338.

(*p*) *Thomas v. Davis*, 1 Dick. 301; *Marquess v. Marchioness of Exeter*, 3 Myl. & C. 321.

(*q*) *Carpmael v. Powis*, 11 Jur. 158.

a re-conveyance would frequently be decreed in cases where the sale of a reversion is effected by private contract, and the consideration was inadequate (*r*), even where a small part of the property was in possession, and the greater part in reversion (*s*). It is otherwise, however, when the estate sold is in effect in possession by reason of the sale being effected by the tenant of the particular estate preceding the reversion and the reversioner (*t*), or if the estate is substantially in possession (*u*), and the relief is less readily afforded, if the reversion is subject to a contingency difficult to calculate (*v*), though such a contingency will not afford an absolute protection to a purchaser at an under-value (*w*).

A greater protection still was afforded to heirs dealing with their expectations for an insufficient consideration (*x*), and relief has been given as against a sub-purchaser who had given a good price for an estate, but had notice of a fraud upon the heir by the vendor to him, and such relief was afforded though the heir joined in

(*r*) *Gowland v. De Faria*, 17 Ves. 24; *Kendall v. Beckett*, 2 Russ. & M. 90; *Hinckman v. Smith*, 3 Russ. 433.

(*s*) *Lord Portmore v. Taylor*, 4 Sim. 182.

(*t*) *Wood v. Abrey*, 3 Madd. 417.

(*u*) *Wardle v. Carter*, 7 Sim. 490; *Scott v. Dunbar*, 1 Moll. 459.

(*v*) *Baker v. Burt*, 1 Russ. & M. 224.

(*w*) *Addis v. Campbell*, 2 Beav. 401; *Cooke v. Burtchaell*, 2 Dru. & W. 165; *Boothby v. Boothby*, 1 Mac. & G. 604.

(*x*) *Cole v. Gibbons*, 3 P. Wms. 293; *Wiseman v. Beake*, 2 Vern. 121.

the re-sale (*y*) ; though it would have been otherwise if the sub-purchaser had not been aware of the fraud upon the heir (*z*) ; and protection will not be thus afforded if it appear that the transaction was known to the father, or other person standing *in loco parentis*, and was not carried out in opposition to him (*a*). These remarks must, however, be taken in connection with the Sales of Reversions Act (*b*), which provides that, no purchase made *bonâ fide*, and without fraud and unfair dealing, of any reversionary interest in real or personal estate, shall thereafter be opened or set aside merely on the ground of undervalue.

(*y*) *Addis v. Campbell*, 4 Beav. 401.

(*z*) *Nagle v. Baylor*, 3 Dru. & W. 60.

(*a*) *King v. Hamlet*, 2 Myl. & K. 473.

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